TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 164.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, ET AL., APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED DECEMBER 6, 1906.

(20,478.)

(20,478.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 513.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, ET AL., APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of HARRY D. BROWN, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Record.

Original Transcript Filed June 8, 1906.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

At a stated term of the District Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and held in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, it being also the third day of that month, in the year of our Lord one thousand nine hundred and sixth, and the one hundred and thirtieth year of the Independence of the United States of America.

Present, the Honorable Albert C. Thompson, District Judge. Among the proceedings had were the following, to-wit:

No. 3775. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Be it remembered, that heretofore, to-wit, on the first day of March, at 4 o'clock P. M., in the year of our Lord one thousand nine hundred and six, there was filed in the Clerk's office of the court aforesaid, the following application of the trustee to bring in additional and necessary parties, which said application is clothed in the words and figures following, to-wit:

Application of the Trustee to Bring in Additional and Necessary Parties.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Application of the Trustee to Bring in Additional and Necessary Parties.

Now comes Fletcher R. Williams, the duly appointed and qualified trustee herein, and presents to the court that it is necessary for the complete determination of matters in controversy herein that certain parties, to-wit, The Triumph Electric Company and
2 The Christian Moerlein Brewing Co., The National Elevator Co., The William T. Johnston Co., The Lavercombe Gas & Electric Fixture Co., The Lynn Filter Mfg. Co., all corporations under the laws of Ohio, Love & Roth, a partnership, and Thomas H. Winston, Frederick A. Lavercombe, William G. Reuter, Christian C. Weber, William H. Gazley, Hannah F. Gazley, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn, and that the trustee herein finds it necessary to sell the lease-hold estate herein set forth, and that the foregoing above-named parties assert claims adverse to the interest of the trustee in said estate and that said named parties should be brought in and be made party to proceedings in bankruptcy herein.

The said trustee further represents that there has been delivered to and that there is held by him a lease-hold estate on the property, located as follows, to-wit:

"being property situate at the southeast corner of Vine Street and Thorpe Alley, being numbers 524, 526 and 528 Vine Street, Hamilton County, Ohio,

Commencing at a point where the south line of Thorpe Alley intersects Vine Street, being the southwest corner of the building on the premises hereby leased; thence southwardly on the east side of Vine Street 53½ feet more or less to the north line of Francis Seifert's property; thence eastwardly on a line dividing the lots of Siefert and lessors about 100 feet; thence north about four feet, thence east along said dividing line about 76 feet to the west line of Lodge Alley; thence north along the west line of Lodge Alley about 47½ feet to the south line of said Thorpe Alley about 176 feet to the East line of Vine Street and the place of beginning,"

being the same leasehold estate and property formerly held and occupied by the bankrupt, Harry D. Brown, in the conduct and operation of his business prior to the proceedings in bankruptcy herein,

by virtue of a leasehold from William H. Gazley *et al.* to Joseph Kueney, duly recorded in Volume 123, page 439, Hamilton County Land Records of leases and duly transferred and assigned to the said Harry D. Brown, bankrupt.

Said trustee further represents that the foregoing and above named parties claim an interest in said leasehold estate adverse to the trustee herein and that it is necessary for the complete determination of the said matters in controversy that the said foregoing and above named parties be brought in and be made parties hereto, and the said trustee asks that they be compelled to set up their interests in said leasehold estate, or that they be forever barred from asserting same.

Wherefore, the said Fletcher R. Williams, trustee, prays that summons issue to the above named parties and that they be compelled to answer and set up their interests in the said leasehold estate described, and further prays for such other and necessary relief as the nature of the premises may require.

FLETCHER R. WILLIAMS, *Trustee.*

STATE OF OHIO, *Hamilton County, ss:*

Personally appeared before me, Fletcher R. Williams, who being first duly sworn says that he is the duly elected and qualified trustee herein, that his foregoing application is in all respects true as he verily believes.

FLETCHER R. WILLIAMS.

Sworn to before me and subscribed in my presence this 28th day of February, A. D. 1906.

[SEAL.] THOS. L. POGUE.

Notary Public, in and for Hamilton County, Ohio.

And afterwards, to-wit, on the 19th day of March, at 11:30 o'clock A. M., A. D. 1906, the following motion to dismiss W. H. Gazley *et al.*, was filed in the Clerk's Office of the court aforesaid, which said motion is clothed in the words and figures following, to-wit:

Motion to Dismiss W. H. Gazley et al.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division:

In Bankruptcy.

EMIL HUTTENBAUER ET AL.,
vs.
HARRY D. BROWN, a Bankrupt.

Now come William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn, made parties to this proceed-

ing, and not intending to enter their appearance herein, but appearing only for the purpose of this motion, moves the court to dismiss them from this proceeding on the ground that this court has no jurisdiction over their persons or the subject matter of the controversy between the trustee in bankruptcy herein and them.

OSCAR W. KUHN,
Attorney for said Defendants.

And afterwards, to-wit, on the 21st day of March, A. D. 1906, an entry was made upon the journal of the court aforesaid, which said entry is clothed in the words and figures, following, to-wit:

Entry—Journal I, page 5.

Application and Motion Sent to Referee.

4 Upon the application of the trustee herein for a hearing on the motion of Emma Donaldson *et al.*, by Oscar Kuhn, their attorney, as to jurisdiction of the court herein the court directs that said motion and the application of the trustee to make parties hereto and all papers and the subpœnas and returns thereon be sent to the referee in this cause for hearing and report thereon.

And afterwards, to-wit, on the 11th day of April, A. D. 1906, an entry was made by the referee herein, which said entry together with his certificate was filed in the Clerk's Office of the Court aforesaid, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, clothed in the words and figures, following, to-wit:

Entry—Overruling Motion to Dismiss for Want of Jurisdiction.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Entry Overruling Motion to Dismiss for Want of Jurisdiction.

This cause coming on to be heard upon the motion of William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn to dismiss them from this proceeding on the ground that the court herein has no jurisdiction over their person or the subject matter in controversy between the trustee herein and the said parties above named, and the said motion having been referred to the referee herein, the said referee on consideration thereof after argu-

ment of counsel thereon for the trustee and the parties so moving to be dismissed and being fully advised in the premises, does overrule said motion, to which ruling of the court the said parties above named, to-wit: William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn do hereby except.

And leave is hereby granted the said named parties to plead herein forthwith without prejudice to their rights reserved in said motion.

CHARLES T. GREVE,
Referee in Bankruptcy.

Cincinnati, April 11, 1906.

And afterwards, to-wit, on the 13th day of April, at 4.05 P. M., A. D. 1906, the following answer of W. H. Gazlay *et al.*, was filed in the Clerk's Office of the court aforesaid, which said answer is clothed in the words and figures following, to-wit:

Answer of W. H. Gazlay et al.

United States District Court, Southern District of Ohio, Western Division. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Answer of W. H. Gazlay *et al.*

Now comes the defendants, W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, made parties hereto, and without intending to enter their appearance herein but acting under protest and the direction of the court, file this their answer herein, and say:

That on or about the — day of July, 1902, they entered into an agreement of lease with one J. D. Kueny whereby they leased to the said J. D. Kueny the premises described in the application herein for a period of ten years from and after July 1st, 1902; that said lease contains the condition, among others, that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assigns should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to re-enter and the same to have again, repossess and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessors' behalf to be done and performed, should cease, determine and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the

written consent of said lessors, but with their acquiescence only and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein. That at the time of the filing of the application herein so far as they know or are informed the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy and therefore pray to be hence dismissed with their costs.

OSCAR W. KUHN,
Attorney for W. H. Gazlay et al.

STATE OF OHIO, *Hamilton County, ss:*

6 W. H. Gazlay, one of the above named defendants, being first duly sworn, says that the facts and allegations contained in the foregoing pleading are, as he believes, true.

W. H. GAZLAY.

Sworn to before me and subscribed in my presence this 13th day of April, 1906.

[SEAL.] OSCAR W. KUHN,
Notary Public.

And afterwards, to-wit: on the 15th day of May, at 9 o'clock A. M., A. D., 1906, there was filed in the clerk's office of the court aforesaid, the following statement of facts, together with the referee's certificate, which said statement of facts is clothed in the words and figures following, to-wit:

Statement of Facts.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Statement of Facts.

It is agreed between all parties hereto that there was executed on or about the 16th day of July, A. D., 1902, a lease between William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, lessors, and Joseph D. Kueny, lessee.

The premises covered by said lease are situated on the east side of Vine street, between Fifth and Sixth streets, in the city of Cincinnati, county of Hamilton, and state of Ohio, and more particularly described in said lease.

The terms of said lease being for ten years from July 7th, 1902, to July 6, 1912, with renewal privilege of ten years, rent seven thousand dollars ($7,000) per annum. Said lease was recorded on September 23, 1902, in lease book No. 123, page 439 of the Hamilton county land records.

It is further agreed that the said lease contains the following terms and stipulations, to-wit:

"Or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept; it shall be lawful for said lessors their heirs or assigns into said premises to re-enter and the same
7 to have again, re-possess and enjoy as in their first former estate; and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine and be utterly void."

It is further agreed that the lessors in said lease, to-wit: William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, on or about the 9th day of April, A. D., 1904, filed their certain petition in the Superior court of Cincinnati, Hamilton county, state of Ohio, in a suit against Joseph D. Kueny *et al.*, in which the said petitioners, being the lessors in said lease, did ask that a receiver be appointed to take possession, the terms of which petition and prayer thereon are as follows, to-wit:

Plaintiffs further state that the value of the custom and good will of the business conducted on said leased premises, known as "The Majestic Restaurant" would be lost to the creditors. Plaintiffs further state that in order to preserve the liens aforesaid and to protect the lessors as well as the claims of the unsecured creditors of the said Joseph D. Kueny, it is necessary that a receiver or receivers be appointed to take charge of the business conducted by said lessee upon said leased premises until a sale of the same can be made to advantage under and by virtue of the orders of this court.

Wherefore plaintiffs pray that the lien reserved in said lease upon said leased premises be declared to be the first and best lien upon the same; that the amount due the defendant, The Triumph Ice Machine Company be ascertained and be decreed and adjudged to be a lien upon the property known as the "Refrigerating Plant" furnished by said company; that the lien due the defendant, The Brunswick-Balke-Collender Company on the billiard tables and fixtures be ascertained and be decreed to be a lien upon the billiard tables and fixtures connected therewith; that the said leased premises and unexpired term of said lease and the fixtures and personal property contained in said restaurant and saloon be adjudged to be appraised, advertised and sold, free and clear of all claims of all parties to this suit, and said leasehold premises and the unexpired term be sold, subject, however, to the terms, covenants and conditions contained in the lease from said plaintiffs to the said Joseph D. Kueny;

that the moneys arising from the sale of said leased premises and the unexpired term of said lease and said fixtures and chattel property contained in said premises be applied
8 to the payment of the amount found to be due the plaintiffs herein; that the receiver or receivers may be appointed with full power and authority to demand, sue for, collect and take into their possession all the goods, chattels, rights and credits, moneys and effects, books, papers, choses in action, including said leasehold premises; and to sell, convey and assign all of said leasehold premises and the unexpired term thereof."

It is further agreed that in said suit so brought the said Joseph D. Kueny filed his answer entering his appearance and consenting that a receiver be appointed for his property, including said leasehold estate, and that an entry was made appointing receivers in said case, and that the receivers attempted to sell said property at private sale and that an entry was made directing that bids be received to sell same at private sale and that bids were so received unsatisfactory to the court. The court then ordered said property to be sold as a going concern.

It further appears that in the statement of assets and liabilities made by the receivers in said suit, the leasehold estate was valued at $45,000, which statement was filed with the court on May 21st, 1904, and that said property was sold to Harry D. Brown, as in said advertisement set forth, and that a motion to confirm said sale was filed by said receivers and an entry made thereon confirming said sale on July 3, 1905; and that thereafter the said receivers in said suit filed a motion to confirm their report of their receipts and disbursements in the operation and management of said Café property; that thereafter the said Harry D. Brown, the purchaser of said property, in said suit filed a motion for right of possession of said property, claiming that the firm of Straus Brothers & Co. were in possession of certain parts of said leasehold property and withheld same from said purchaser, Harry D. Brown; and that a proper copy of said lease and court proceedings so had is evidenced by exhibits 1 to 16, here*by* attached, and made parts hereof.

It further appears that an entry was made directing that the said property be sold as a going concern, and that an order for such sale was had, and that the proof of publication made under such order of sale shows that the leasehold estate was included in said property so ordered to be sold.

It is further agreed between the parties hereto, that subsequent to the purchase of said property by said Harry D. Brown, that large sums of money, to-wit: about the sum of $20,000, was expended in the improvement of said property.

It is further agreed that after the purchase of said lease-
9 hold estate by Harry D. Brown, that the said Harry D. Brown paid to the said lessors the rents, taxes, insurance, etc., and obligations due and payable on said leasehold estate, as in said lease provided and continued to pay said rents up to and including rent due and payable Jan. 1, 1906.

It is further agreed between the parties hereto that on or about

the 17th day of January, A. D. 1906, a petition was filed by Emil Huttenbauer and others in the United States District Court for the Southern District of Ohio, against Harry D. Brown in bankruptcy, cause 3775, to declare the said Harry D. Brown a bankrupt, and that on the said date, January 17, 1906, one Fletcher R. Williams was duly appointed receiver for the bankrupt estate of said Harry D. Brown and took possession of the said leasehold estate and other properties belonging to said Harry D. Brown, known as the Majestic Café, and continued to operate same as a going concern until on or about the 28th day of February, 1906, when the said Fletcher R. Williams was duly elected trustee by the creditors of the said bankrupt estate, and qualified as such trustee, and took possession of said leasehold property and the other properties of the said bankrupt.

It is further agreed that the said Fletcher R. Williams paid to the said lessors the rent due and payable, February 1, 1906, while he occupied such property as receiver and that he paid to said lessors the rents due and payable March 1st, 1906, and after he had qualified as trustee for said bankrupt estate, and it is further agreed that on March 1st, 1906, that said Fletcher R. Williams, trustee, filed his application asking that said lessors be made parties to the bankruptcy proceedings herein to determine the rights of said lessors in said leasehold estate, and that an order was made on said date, March 1, 1906, directing that subpœna issue to William H. Gazlay *et al.*, making them parties therein, and it is further agreed that said subpœna so issued under said order was received by the marshal of the United States Court for the Southern District of Ohio, Western Division, and for the marshal of New York on the 3rd day of March, 1906, and that service was made on William H. Gazlay, Oscar W. Kuhn, Clara G. Kuhn, and H. F. Gazlay by the marshal of the Southern District of Ohio, March 5, 1906, and on the same date, March 5, 1906, service was made on Hulda G. Miller, —— Stewart, and —— Stewart, her husband, by the marshal for New York, and that Emma G. Donaldson was not served with subpœna until March 9, 1906, and that the rents due and payable to the lessors on March 1st, 1906, *was* paid to them by Fletcher R. Williams on March 6th, 1906.

It is further agreed between the parties hereto that when the said Fletcher R. Williams as receiver under the order of the court in the proceedings in bankruptcy herein took possession of said property and leasehold estate, he stated to Oscar W. Kuhn, the attorney and agent for the lessors, that he desired to sell the said leasehold estate; the said Oscar W. Kuhn, attorney and agent for said lessors, stated to the receiver of the court and to its attorneys, that he would not consent to the sale of said leasehold estate for the benefit of the creditors of the bankrupt, and it is further agreed, that said Oscar W. Kuhn, attorney and agent for said lessors repeated this statement at different times to said receiver and his attorneys, while said receiver was occupying said premises and leasehold estate, both as receiver and after he had been elected and qualified as trustee of said bankrupt estate, and as such trustee had taken possession of said properties and leasehold estate for the benefit of the creditors of the bankrupt,

and which the said trustee held at the time of the filing of the application hereinbefore referred to on March 1, 1906.

It is further agreed between the parties hereto that the receipts for the rents paid by the said receiver and by the said trustee herein, for the rents due and payable February 1st, 1906, and March 1, 1906, were as follows, to-wit:

CINCINNATI, *Feb.* 1, 1906.

Received of F. R. Williams, receiver for H. D. Brown, five hundred and eighty-three and 34-100 dollars for rent of Majestic, No. 524–528 Vine street for one month ending January 31st, 1906.

THE GAZLAY ESTATE,
Per W. H. GAZLAY.

$583.34.

CINCINNATI, *March* 5, 1906.

Received of F. R. Williams, trustee Majestic, five hundred and eighty-three and 34-100 dollars for rent of Majestic No. — Vine street for one month ending February 28, 1906.

THE GAZLAY ESTATE,
Per W. H. GAZLAY.

$583.34.

And afterwards, to-wit: on the same day and at the same hour, there was filed in the clerk's office of the court aforesaid, the following copy of lease, together with the referee's certificate, which said copy of lease is clothed in the words and figures, following, to-wit:

11 *Copy of Lease.*

Lease.

Wm. H. Gazlay *et al.* to Joseph D. Kueny.

Premises: East side Vine bet. 5th & 6th, Cinti., O.

Terms: 10 years July 7th, 1902, to July 6th, 1912. Renewal privilege: 10 years same terms, &c. Rent: $7,000 per annum, $583.34 per month. Recorded, Sept. 23rd, 1902, book 123, page 439.

This lease made this 16th day of July, A. D. 1902, between William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, lessors and Joseph D. Kueny, lessee, witnesseth:

That said lessors in consideration of the rents and covenants hereinafter contained and by said lessee and his assigns to be paid and performed, do hereby grant, devise and lease to the said lessee, his executors, administrators and assigns, the premises situated in the city of Cincinnati in the county of Hamilton and state of Ohio, and described as follows:

Situate on the east side of Vine St. between Fifth and Sixth streets,

commencing at a point where the south line of Thorp alley intersects Vine St. being the northwest corner of the building on the premises hereby leased; thence southwardly on the east side of Vine street fifty-three and one-half (53½) feet more or less to the north line of Francis Siefert's property; thence eastwardly on a line dividing the lots of Siefert's and of said lessors about one hundred (100) feet; thence north about four (4) feet; thence east along said dividing line about seventy-six (76) feet to the west line of Lodge alley, thence north along the west line of Lodge alley about forty-seven and one-half (47½) feet to the south line of Thorp alley, and thence west along the south line of said Thorp alley about one hundred and seventy-six (176) feet to the east line of Vine street and place of beginning.

To have and to hold the same with the appurtenances unto the said lessee, his executors, administrators and assigns from the 7th day of July, A. D., (1902) nineteen hundred and two, for and during the full term of ten years, next ensuing and fully to be completed and ended on the 6th day of July, A. D., 1912, with the right and privilege on the part of the lessee to renew the within lease for a further period of ten years from the 7th day of July, 1912, said renewal term to be fully completed and ended on the 6th day of July, 1922. The terms and conditions of said renewal to be in all respects as the terms and conditions contained in the within lease, and no further instrument shall be necessary to evidence the terms and conditions
12 of said renewal lease upon the exercise of the privilege of renewal by said lessee, his executors, administrators and assigns, but the within instrument is to be considered as embodying all the terms and conditions as evidencing said renewal term upon the exercise of the privilege of said renewal on the part of said lessee, his executors, administrators or assigns.

Yielding and paying therefor, during the said term, or the renewal thereof, the sum of $7,000 per annum, payable in monthly installments of $583.34 each from the 1st day of January, 1903. The first installment of rent to become due and payable on the first day of February, 1903, and a like installment to become due and payable on the first day of each month thereafter during the terms demised and the renewal thereof, but no rent whatever shall be due and payable or collected from the date of this lease up to the first day of January, 1903, lessee to collect the rent from all sub-tenants in said building from and after Jan. 1st, 1903. Provided, however, that if the said rent or any part thereof shall remain unpaid for — days, after it shall become due and without demand made therefor; or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee'- interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs, or assigns, is first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept; it shall be lawful for said lessors their heirs or assigns into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate; and thereupon this lease and everything therein contained on the said lessors' behalf

to be done and performed, shall cease, determine and be utterly void.

And said lessee for himself and for his executors, administrators and assigns, covenant- and agree- with said lessors, their heirs and assigns, as follows; that is to say that said lessee will pay said rents, in the manner aforesaid, unless said premises shall be destroyed or rendered untenantable by fire or unavoidable accident; that he will not do or suffer any waste therein; that he will not assign this lease or underlet said premises, nor any part thereof without the written consent of said lessors and that at the end of said term he will deliver up said premises in as good order and condition as they now are or may be put by said lessors' reasonable use and ordinary wear and tear, and damage by fire and other unavoidable casualty excepted; and further that for the said rents to be paid by said lessee and assigns a lien is hereby reserved upon the premises hereby
13 leased, and the interest of said lessee and assigns in and to the same in favor of said lessors, their heirs and assigns, prior and preferable to any and all other liens thereupon whatsoever.

And said lessee for himself and for his executors, administrators and assigns further covenants and agrees with said lessors, their heirs and assigns.

A. To pay all taxes, rates, charges and assessments that may be in any way levied, taxed, rated, charged or assessed upon said premises for the last half of the year 1902, and all succeeding years under this lease or any renewal thereof.

B. To keep the lessee's interest in the within lease, the improvements or fixtures made or placed upon the within premises by the said lessee, his heirs, executors, administrators and assigns, insured to an amount of $—.

C. To pay any increase in the rate of insurance on the buildings standing upon said premises, made necessary or caused by lessee's use or occupancy of same.

And said lessors for themselves, and for their heirs, executors, administrators and assigns, covenant and agree with said lessee, his administrators and executors.

a. That said lessee paying the rents, and observing and keeping the covenants of this lease on his part to be kept, shall lawfully, peaceably and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation by said lessors or their heirs or any person or persons lawfully claiming under them.

b. That said lessee, his heirs, executors, administrators or assigns, shall have the right to make any improvements, repairs or alterations, he or they may deem necessary within or upon the premises hereby demised, provided that no injury be done to said buildings, and provided further that all changes, alterations or improvements shall become a part of the realty as soon as made and belong to the lessors.

c. To keep the roof of said building in repair.

d. To prosecute at their expense the suit now pending in the Superior court of Cincinnati against Eugene L. Lewis, *et als.*, for a reduction of the tax value of the premises hereby demised.

In witness whereof the said parties to these presents have hereunto set their hands the day and year first above written.

Signed and acknowledged in the presence of us:

CLARA S. MILLER,
MARY C. CARTER,

14 As to HANNAH F. GAZLAY,
HULDA G. MILLER,
W. H. GAZLAY,
HANNAH F. GAZLAY,
HULDA G. MILLER,
JULIA G. STEWART,
ELWIN K. STEWART,
EMMA G. DONALDSON,
By W. H. GAZLAY.
JULIA G. STEWART AND
ELWIN K. STEWART,
MARY HAMANT,
EUGENE C. PONEY,
ANDREW DONALDSON,
CLARA G. KUHN,
By W. H. GAZLAY.
OSCAR W. KUHN,
By W. H. GAZLAY.

Witness as to W. H. Gazlay, Emma C. Donaldson and Andrew Donaldson, Clara G. Kuhn and O. W. Kuhn:
SIMEN M. JOHNSON.

JOSEPH D. KUENY.

As to Jos. D. Kueny:
LOUISE K. FOSTER.

STATE OF NEW YORK, *County of Suffolk, ss:*

Be it remembered that on the eleventh day of July, in the year of our Lord one thousand nine hundred and two before me the subscriber a notary public, in and for said county, personally came Hannah F. Gazlay, Hulda G. Miller, Julia G. Stewart, Elwin K. Stewart, the parties named in the foregoing lease and acknowledged the signing thereof to be their voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

[SEAL.] MARY C. CARTER,
Notary Public.

STATE OF OHIO, *County of Hamilton, ss:*

Be it remembered that on the 15th day of July, A. D. 1902, before me the subscriber, a notary public in and for said county personally came W. H. Gazlay; Emma G. Donaldson, Andrew Donaldson, the latter two by W. H. Gazlay, Clara G. Kuhn, and Oscar W. Kuhn,

five of the parties to the foregoing lease, and acknowledged the signing thereof to be their voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name
15 and affixed my notarial seal on the day and year last aforesaid.

EUGENE C. POCIEY,
Notary Public, Hamilton County, Ohio.

STATE OF OHIO, *Hamilton County, ss:*

Be it remembered that on the 16th day of July in the year of our Lord 1902, before me the subscriber, a notary public, in and for said county personally came Joseph D. Kueny, one of the parties named in the foregoing lease, and acknowledged the signing thereof to be his voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

SIMEN M. JOHNSON,
Notary Public, Hamilton County, O.

Transferred in blank.
(Signed) JOSEPH D. KUENY.

Endorsed: Copy of lease. J. D. Kueny. Filed July 3, 1905.

And afterwards, to-wit: but on the same day and at the same hour, there was filed in the clerk's office of the court aforesaid, the following order for sale in Superior court case, marked exhibit 8, together with the referee's certificate, which said order for sale is clothed in the words and figures, following, to-wit:

Order for Sale in Superior Court Case.

Superior Court of Cincinnati.

No. 52409.

W. H. GAZLAY ET AL., Plaintiffs,
vs.
J. D. KUENY ET AL., Defendants.

Entry.

It appearing to the court that the receivers herein gave notice that they would receive bids for the purchase of the Majestic Café as a going concern, in accordance with the order of this court, and that they failed to receive a bid for the purchase of same.

It is therefore considered and ordered by this court that said receivers be and they hereby are authorized and directed to offer the said Café, including the leasehold estate and all the stock fixtures,

etc., used in the prosecution of said business, at public auction on the premises; first as an entirety, and if no bid satisfactory to the said receivers is received that they proceed to sell all of the personal property in possession of said receivers in lots to suit purchasers.

And in selling the above property the said receivers are hereby directed to offer separately,

16 First, the leasehold estate in the property occupied by said Majestic Café, including the cigar store occupied by Strauss Bros. & Company;

Second, the paintings claimed of record by Emery H. Barton.

Third, all the rest and residue of the property in the possesssion of said receivers and used by them in the prosecution of said business, including all stock and merchandise in hand, but excepting cash and outstanding accounts due to the receivers.

It is further ordered that for this purpose they are hereby authorized to employ an auctioneer to auction off all of the property in their possession as receivers of J. D. Kueny, and to expend in extra advertising a sum not to exceed $100 and that they report their proceedings to this court without delay.

And that the terms of the sale are to be cash on the day of the sale.

Endorsed: Entered June 17, 1905.

And afterwards, to-wit, but on the same day and at the same hour, there was filed in the Clerk's Office of the court aforesaid, the following Entry of Superior Court confirming sale, together with the referee's certificate, which said Entry is clothed in the words and figures following, to-wit:

Entry of Superior Court Confirming Sale.

Superior Court of Cincinnati, Ohio.

No. 52409.

W. H. GAZLAY ET AL., Plaintiffs,
vs.
J. D. KUENY ET AL., Defendants.

Entry.

This cause coming on this day to be heard upon the motion of Oscar W. Kuhn and F. L. Emmert, as the duly appointed and qualified receivers of J. D. Kueny, to confirm the sale of all the personal property of said J. D. Kueny, in their possession as such receivers, and to distribute the proceeds derived from said sale, was submitted to the court.

Upon consideration whereof the court find that said proceedings and sale were made in all respects in conformity to law and to the orders of this court, and do therefore hereby approve and confirm

same and do order said Oscar W. Kuhn and F. L. Emmert, as such receivers, to convey and deliver to the purchaser, Harry D. Brown, the properties as purchased by him; and a writ of possession is awarded to put said purchaser in possession of said property.

And as to all questions relating to the distribution of the
17 proceeds of said sale, this cause is continued for further hearing.

Endorsed: No. 52409. Superior Court of Cincinnati, Ohio, W. H. Gazlay, *et al.*, Plaintiffs, *vs.* J. D. Kueny, *et al.*, Defendants.
Entry: Filed July 3, 1905. Pogue & Pogue, Counsellors at Law, 908-909 First National Bank Bldg., Cincinnati, Ohio.

And afterwards, to-wit, on the 14th day of May, A. D. 1906, an entry was made by the referee herein, which said entry, together with the said referee's certificate, was filed in the Clerk's Office of the court aforesaid, on the 15th day of May, at 9 o'clock A. M., and is clothed in the words and figures following, to-wit:

Entry of Referee.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Entry.

This cause coming on for further hearing on the application and petition of the trustee in bankruptcy, as to the leasehold estate of the bankrupt, Harry D. Brown, heretofore referred to the undersigned referee, and the answer of William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the referee, after hearing the adverse interests, on the issues joined, finds that this court has jurisdiction of the matters involved and set forth in the petition and application.

The referee further finds that F. R. Williams, trustee in bankruptcy of the bankrupt, Harry D. Brown, has elected to take said leasehold estate, and is in lawful possession of the same and is entitled to sell said leasehold estate, convert the value thereof into money for the purpose of distributing the money realized from the sale thereof, and free from the claim of the said lessors heretofore named to forfeit said estate by reason of said sale by the trustee or of the proceedings heretofore had herein, and the referee further finds that said trustee aforesaid is entitled to convey said leasehold estate free from the claim of said lessors to forfeit said leasehold by reason

of the bankruptcy of said H. D. Brown or by reason of any sale or assignment of said leasehold property that may be made pursuant to the orders of this court for the purpose of converting said property into assets for distribution, to all of which rulings and orders
18 of the said referee, said lessors, William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn hereby except. This cause is reserved for further orders of the referee herein as to all matters not determined herewith.

CHARLES T. GREVE,
Referee in Bankruptcy.

May 14, 1906.

And afterwards, to-wit, on the 14th day of May, A. D. 1906, the following petition of W. H. Gazlay, *et al.*, was filed with the referee herein, which said petition together with the said referee's certificate, was thereupon, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, filed in the Clerk's Office of the court aforesaid, and is clothed in the words and figures following, to-wit:

Petition of W. H. Gazlay, et al., for Review.

In the District Court of the United States for the Southern District of Ohio, Western Division.

Filed May 14, 1906. Charles T. Greve, Referee in Bankruptcy.

In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.,
vs.
HARRY D. BROWN, Bankrupt.

Now come W. H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Elwin K. Stewart, Clara G. Kuhn and Oscar W. Kuhn, made defendants to the application of the trustee in bankruptcy herein, for an order authorizing him to sell the leasehold estate of said Harry D. Brown in and to the property described in said application, and respectfully file herewith their petition for review of the orders of the referee entered herein on the 11th day of April, 1906, and on the 12th of May, 1906, respectively.

Petitioners respectfully represent that said referee erred.

1st. In overruling their motion to be dismissed as parties defendant to the application of said trustee to sell the leasehold estate in the property therein described, on the ground that the court had no jurisdiction over their persons and that said petitioners had no interest by way of lien or otherwise at the date of said application of which this court could take cognizance.

2nd. In ordering and adjudging that these petitioners had no right to forfeit the lease of said Harry D. Brown in the event of a

sale of same under the application of the trustee in bankruptcy herein, because by the terms of the lease this right was reserved to petitioners as against the original lessee only, and could not
19 be asserted against any other person whatsoever because neither expressly nor impliedly named in said lease.

3rd. In adjudging that these petitioners could not assert said right of forfeiture as against the trustee in bankruptcy herein for the added reason that they had accepted rent from him as such trustee.

4th. In ordering said trustee in bankruptcy herein to sell said leasehold estate in said premises clear and free from any claim or right on the part of the petitioners to forfeit same in event of a sale.

5th. In his conclusions of law from the evidence offered at said hearing.

6th. Wherefore, the said W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Edwin K. Stewart, Clara G. Kuhn and Oscar W. Kuhn respectfully pray that said two orders of the referee entered herein, respectively on the 11th day of April, 1906, and on the 12th day of May, 1906, be reviewed by the Honorable Judge of the District Court of the United States for the Southern District of Ohio, Western Division, and that said orders be adjudged erroneous and void.

OSCAR W. KUHN,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, County of Hamilton, ss:

I, W. H. Gazlay, one of the petitioners mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief.

W. H. GAZLAY.

Subscribed and sworn to before me this 14th day of May, A. D. 1906.

HENRY BENTLEY,
[SEAL.] *Notary Public, in and for Hamilton County, Ohio.*

40c Due Notary.

And afterwards to-wit, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, the following certificate of referee was filed in the Clerk's Office of the court aforesaid, which said certificate is clothed in the words and figures following, to-wit:

Certificate of Referee on Petition to Review.

United States District Court, Southern District of Ohio, Western Division.

No. 3775. In Bankruptcy.

In re EMIL HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

I, Charles T. Greve, one of the referees of said court in
20 bankruptcy, do hereby certify that in the course of the proceedings in said cause, in the matter of the petition of the trustee to make William H. Gazlay, *et al.*, parties to this proceeding and for direction as to the sale of the leasehold estate and also upon the motion of said Wm. H. Gazlay, *et al.*, to dismiss said William H. Gazlay, *et al.*, from this suit, and upon the answer of said William H. Gazlay and others to the petition, a certain entry and order overruling said motion of said William H. Gazlay, *et al.*, was made by the referee on April 11, 1906, to which said William H. Gazlay, *et al.*, then and there excepted, and that thereafter, on May 12, 1906, a certain entry and order was made by the referee as to the issues involved in said petition and said answer, to which entry and order William H. Gazlay and others then and there excepted, which original entries and orders are hereto attached and made a part hereof, and that thereafter said William H. Gazlay, *et al.*, filed with the referee, their petition for review of said entries and orders, setting out the errors complained of, as will appear from said petition which is attached hereto. I therefore certify that the statement of facts hereinafter included and made a part hereof, is the statement of the facts agreed upon between counsel and considered by the referee in forming his judgment, and I certify also that the referee did find from said facts, the following conclusions of law:

First. Where the trustee in bankruptcy is in lawful possession of leasehold premises under a lease which contains certain conditions as to forfeiture, and the lessors maintain that the title of said trustee in bankruptcy and the power of said trustee to sell said property is subject to certain conditions, there is a matter in controversy between said trustee and said lessors and the court in bankruptcy has power to bring in said lessors as parties for the complete determination of said matter.

Second. Where said lease contains a condition, "if said lessee shall assign this lease—, or if said lessee interest therein shall be sold under execution or other legal process without the written consent of said lessors and heirs or assigns is first had," with a proviso for lessor's re-entry in case of breach, said trustee in bankruptcy holds said property with power to sell the same as part of the estate of the bankrupt and reduce the same to money for the purpose of distribution.

Third. Where a lease made to K. contains a condition as set forth in the foregoing paragraph, said condition applies only to the estate of K. and does not affect the estate of any successor in inter-
21 est to K., if said estate of K. has been transferred by legal process upon the application of the lessors and with their consent to said successor in interest.

Fourth. Such conditions as those referred to in the foregoing paragraphs are single and indivisible, and when once broken and the breach is either licensed or waived, the condition is gone forever.

Fifth. Where a lease is made to K, with such conditions as hereinbefore recited, and said lease in the suit of the lessors, is sold at public auction in said proceeding to B, and B thereafter becomes bankrupt, and the trustee in bankruptcy elects to assume and take said leasehold estate as part of the assets of the bankrupt and enters into possession of said leasehold premises, said possession can be only for the purpose of sale and distribution to the creditors of said bankrupt estate.

Sixth. Where said trustee has entered into possession of a leasehold estate as hereinbefore described and has paid rent to the lessors, for said premises as such trustee and said rent has been accepted by said lessors from said trustee in bankruptcy, said lessors are precluded from denying the title of said trustee in bankruptcy, and the right of said trustee in bankruptcy to convert said estate into cash for the purpose of distribution to creditors.

The referee attaches hereto his statement of the reasons which led him to the conclusions hereinbefore set out.

CHARLES T. GREVE.
Referee in Bankruptcy.

Cincinnati, May 14, 1906.

And afterwards, to-wit: on the 31st day of May, 1906, at 11 o'clock A. M., the following reply to F. R. Williams, trustee, was filed in the clerk's office of the court aforesaid, which said reply is clothed in the words and figures following, to-wit:

Reply of F. R. Williams, Trustee.

United States District Court, Southern District of Ohio, Western Division. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Reply of F. R. Williams, Trustee.

Now comes F. R. Williams, trustee of Harry D. Brown, bankrupt, and defendant in this original action, and for reply to the answer of the defendants, W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, states that he admits "that

on or about the — day of July, 1902, they entered into an
22 agreement of lease with one J. D. Kueny, whereby they leased to the said J. D. Kueny the premises described in the application herein for a period of ten years from and after July 1st, 1902; with privilege of renewal for ten years additional; that said lease contains the condition, among others, that if said lessee should assign the lease or underlet said leased premises or any part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assigns should fail to keep any of the other covenants of the lease by lessee to be kept it should be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in the first and former estate; and thereupon this lease and everything therein contained in said lessors' behalf to be done and performed, should cease, determine and be utterly void."

Said trustee further states that on the 9th day of April, 1904, the aforesaid defendants, the original lessors, filed a suit in the Superior Court of Cincinnati, Hamilton county, Ohio, No. 52409, wherein they sought to sell the leasehold estate of Jos. D. Kueny, the original lessee; that as a result of the said proceedings receivers were appointed who held the said property until the 24th day of June, 1905, when after various attempts had been made to sell the leasehold estate of Jos. D. Kueny at private sale, the property was put up and sold at public auction, without limit or reserve, and the said property was bid in by Harry D. Brown, the bankrupt herein, and that said trustee further says that the said Harry D. Brown paid rent to these defendants and continued to so pay rent until he was adjudged a bankrupt in these proceedings herein; that F. R. Williams was duly appointed receiver to hold the property of the said bankrupt until a trustee could be elected; that as said receiver on the — day of February, 1906, he paid rent to the said W. H. Gazlay for said lessors as receiver of the said Harry D. Brown, bankrupt, the said W. H. Gazlay being one of said lessors; that on the 27th day of February, 1906, at a creditors' meeting of the said Harry D. Brown, bankrupt, the said F. R. Williams was elected trustee of the said Harry D. Brown, bankrupt, and that before March 1st, 1906, he instituted proceedings in this cause, which are shown in the application filed herein to have his rights in the said property determined; that after instituting said proceedings summons had been served on all the answering defendants, save one, who was a non-resident of
23 the state of Ohio; there was paid by him as such trustee to the same W. H. Gazlay, agent for all the other answering defendants lessors, the rent for the month of February, 1906; that said rent was received by said W. H. Gazlay for all the said lessors; that he holds the same and that neither the same nor any part thereof has been refunded to the trustee herein.

Wherefore this said trustee now prays, that having fully replied to the answer of the said lessors that the relief prayed for in his original petition may be granted.

——— ———,
Attorneys for F. R. Williams, Trustee of Harry D. Brown, Bankrupt.

STATE OF OHIO, *Hamilton County, ss:*

F. R. Williams, being first duly sworn, says that he is the trustee of Harry D. Brown, bankrupt, and that the facts set forth in the foregoing reply are true as he verily believes.

F. R. WILLIAMS.

Sworn to before me and subscribed in my presence this 29th day of May, A. D., 1906.

J. W. CURTIS,

[SEAL.] *Notary Public, in and for Hamilton County, Ohio.*

40c paid by Pogue & Pogue.

And afterwards, to-wit: on the 31st day of May, A. D., 1906, at 12:30 o'clock P. M., the following memorandum of Judge Thompson was filed in the clerk's office of the court aforesaid which said memorandum is clothed in the words and figures, following, to-wit:

Memorandum of Judge Thompson.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 3775. Mem.

EMIL HUTTENBAUER ET AL.
vs.
HARRY D. BROWN.

Petition for Review.

The lease provides that—"If said lessee interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had * * * it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter, and the same to have again re-possess and enjoy as in their first and former estate."

The lease further provides that—"A lien is hereby reserved upon the premises hereby leased, and the interest of said lessee and assigns in and to the same, in favor of said lessors, their heirs and
24 assigns, prior and preferable to any and all other liens thereupon whatsoever."

Kueny, the lessee, became insolvent and thereupon the lessors brought a suit in the Superior Court of Cincinnati, Hamilton county, Ohio, to enforce said lien for non-payment of rent, and under a decree of said court in said suit the leasehold estate of said Kueny in the property was sold to Brown without any reservation whatever.

Afterwards, Brown became insolvent, and in a proceeding instituted in this court by his creditors, he was adjudged a bankrupt and his property, including the leasehold estate, was placed in the hands

of a receiver, and afterwards, in the hands of a trustee elected by the creditors under the provisions of the bankrupt law.

Pending this proceeding, and on the first day of February, 1906, W. H. Gazlay, one of the lessors and agent for his co-lessors, to collect the rent, accepted and received from the receiver the rent due under the lease for the month of January, 1906; and afterwards, on the 5th day of March, 1906, accepted and received from the trustee the rent due under the lease for the month of February, 1906.

March 1st, 1906, the trustee, with a view to the sale of the leasehold, filed a petition herein, bringing in parties claiming to have liens, etc., upon said leasehold estate, and among others, the lessors who are now asserting the right, in event of a sale thereof, to re-enter and take possession of said property, under the forfeiture clauses of the lease hereinbefore set forth, and the trustee seeks to have the title to said leasehold, which was vested in him by the operation of the bankrupt law, quieted, against the said claims of the said lessors.

March 3d, 1906, the lessors, Hulda G. Miller and Julia G. Stewart, were duly served with process. On the 5th of March, 1906, the lessors, William H. Gazlay, Hannah F. Gazlay and Clara G. Kuhn, were duly served with process, and on the 9th of March, 1906, Emma G. Donaldson was also served with process—all being served before the February installment of rent was paid, except Emma G. Donaldson.

1. The court has jurisdiction to bring in the lessors and all persons claiming to have any estate or interest in, or lien upon the leasehold, and to require them to set up their claims for adjudication, with a view to the sale or other disposition of the property to the best advantage of all concerned.

(Bankrupt Law, Sec. 2, Paragraphs 6, 7 and 15.)

2. Did the lessors waive the right to enforce the forfeiture clauses by accepting and receiving rent from the receiver and from the trustee?

Knowledge of the proceeding in bankruptcy would be notice to the lessors that upon the adjudication of Brown as a bankrupt, the title to, and the right to the possession of the leasehold, would pass from Brown to the trustee in bankruptcy, and the acceptance of the rent with such knowledge and notice would be an acquiescence in the transfer, and a waiver of the right to enforce the forfeiture.

William H. Gazlay, one of the lessors, was the agent of his co-lessors to collect the rent, and with full knowledge of the terms and conditions of the lease and of the forfeiture clauses thereof, collected the rent from the receiver and the trustee, for the months of January and February, 1906; but it is not shown that he was authorized to waive the forfeiture, or that his co-lessors had knowledge of the pendency of the proceedings in bankruptcy, or of the collection of the rents from the receiver and trustee, prior to the service of process upon them in this proceeding; and the defendant, Emma G. Donaldson, was not served until six days after the payment of the February instalment of the rent, and her right to enforce the for-

feiture has not been waived by her agent's acceptance of the payment of rent by the trustee.

3. The doctrine of Dumper's Case, 4th Coke, 119, in the absence of statutory provisions to the contrary, is applicable here, and it follows that the lessors set the leasehold free from the operation of the forfeiture clauses when, at their instance, it was sold tc Brown "under legal process" issued by the Superior Court of Cincinnati, and it may be noted that that court did not direct or require that it be sold subject to the terms, covenants and conditions of the lease, as prayed for in the petition.

4. It is conceded, by counsel for the lessors, that the legal title and right to the possession of the leasehold estate, by operation of the Bankrupt Law, passed to and vested in the trustee in bankruptcy, in trust for the creditors of the bankrupt, free from the operation of the forfeiture clauses of the lease, and it follows that a sale of the leasehold by the trustee would not convey to the purchaser any interest or property right of Brown, his interest therein, as lessee, having heretofore been transferred to the trustee by operation of law, and against which transfer no provision had been made in the forfeiture clauses of the lease. A sale under "legal process" means a sale made in obedience to a writ issued or an order or a decree made by a court of competent jurisdiction, and the
26 phrase "legal process," can not be construed to mean or include a transfer of the title to property by operation of law. *In re* Ells, 98 Fed., 967, the forfeiture clause of the lease providing that

"If the estate hereby created shall be taken on execution or by other process of law, or if the lessee, or his executors, administrators or assigns, shall be declared bankrupt, or insolvent according to law, or if any assignment shall be made of his or their property for the benefit of creditors, then and in any of the said cases (notwithstanding any license of any former breach of covenant, or waiver of the benefit hereof or consent in a former instance) the lessors or their successors, heirs or assigns, lawfully may, immediately or at any time thereafter, and without demand or notice, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate," etc.

And the lessee having been adjudicated a bankrupt, the forfeiture was enforced; but here, the right and title of Brown to the leasehold was not sold or transferred to the trustee under "legal process," and if hereafter sold by the trustee under "legal process," it will not convey any title, or interest of Brown therein, but will convey to the purchaser the title vested in the trustee by operation of the Bankrupt Law. (Bankrupt Law, Sec. 70, Paragraphs *a* and *c*.)

The purchaser will take title from the trustee and not from Brown.

The findings and order of the referee will be affirmed.

And afterwards, to-wit, on the 2nd day of June, A. D. 1906, at 10 o'clock A. M., an entry was made upon the journal of the court

aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry: Journal I, page 83.

Decree.

This cause coming on to be heard on the petition of W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, for review of the orders of court entered herein by Charles T. Greve, one of the referees of this court, on an application filed by the trustees of the bankrupt, F. R. Williams, to have said W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, petitioners herein, and others appear and assert what claim, if any, they have to the property described in said application, the motion of said petitioners, answer of said petitioners, the reply of the said trustee, the certificate of the
27 referee and the evidence, and the court being fully advised, delivered a written opinion, which was filed herein on the 31st day of May, 1906, and in pursuance of said written opinion it is considered, ordered and decreed by the court that orders of the referee are hereby confirmed and a petition for review filed by W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, on the — day of May, 1906, is dismissed at the cost of said petitioners. To which action of the court the said W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the petitioners herein, except.

And afterwards, to-wit, on the 6th day of June, A. D. 1906, at 1:30 o'clock P. M., the following petition for appeal of W. H. Gazlay, *et al.*, was filed in the Clerk's Office of the court aforesaid, which said petition for appeal is clothed in the words and figures following, to-wit:

Petition for Appeal of W. H. Gazlay et al.

In the District Court of the United States for the Southern District of Ohio, Western Division. In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

Petition on Appeal of W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn.

The above named W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, considering themselves aggrieved by the judgment made and entered on the 2nd day of June, 1906, in the above entitled cause, do hereby appeal from said judgment to the United States Circuit Court

of Appeals for the Sixth District, for the reason specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth District.

OSCAR W. KUHN,
Attorney for Appellants.

The foregoing claim of appeal is allowed. Appeal bond, $200.00.

J. K. RICHARDS,
U. S. Circuit Judge.

June 6, 1906.

28 And afterwards, to-wit, but on the same day and at the same hour, the following assignment of errors of W. H. Gazlay, *et al.*, was filed in the Clerk's Office of the court aforesaid, which said assignment of errors is clothed in the words and figures following, to-wit:

Assignment of Errors of W. H. Gazlay et al.,

In the District Court of the United States for the Southern District of Ohio, Western Division. In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

Assignment of Errors of W. H. Gazlay *et al.*

Now come W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein, and having asked for an allowance of an appeal from the decree herein against them, assign for errors in said decree and the proceedings of the court therein the following:

First. That the court erred in finding and decreeing that the petition of the said W. H. Gazlay, *et al.*, to review the findings and orders of the referee herein should be dismissed.

Second. That the court erred in affirming the order of the referee herein overruling the motion of said W. H. Gazlay, *et al.*, to be dismissed as parties defendant to the application of the trustee in bankruptcy to sell the leasehold estate of Harry D. Brown in the property described therein on the grounds that the court had no jurisdiction over their persons and that said W. H. Gazlay, *et al.*, had no interest in said leasehold estate by way of lien at the date of said application of which this court could take cognizance.

Third. That the court erred in affirming the finding of the referee herein that appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the trustee in bankruptcy herein, because by the terms

of said lease this right was reserved to appellants as against the original lessee only, and could not be asserted against the trustee in bankruptcy nor any other person whatsoever, because they were neither expressly nor by implication named in said lease.

Fourth. That the court erred in affirming the finding of the referee herein that appellants could not assert said right of forfeiture as against the trustee in bankruptcy herein, for the reason that they had accepted rent from him as such trustee, thereby waiving any right they may have had to forfeit said lease.

Fifth. That the court erred in affirming the finding of
29 the referee herein that appellants could not assert said right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on execution or other legal process without the written consent of the lessors, the appellants herein.

Sixth. That the court erred in affirming the finding of the referee herein that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from any claim or right on the part of appellants to forfeit same in the event of a sale.

Seventh. That the court erred in affirming the referee's conclusions of law from the agreed statement of facts.

Wherefore these appellants pray that the finding and decree of the court against them be reversed and held for naught and that the court may be directed and ordered to enter such a decree as is proper.

OSCAR W. KUHN,
Solicitor for Appellants.

And afterwards, to-wit: on the 6th day of June, A. D., 1906, at 4 o'clock P. M., the following appeal bond was filed in the clerk's office of the court aforesaid, which said appeal bond is clothed in the words and figures, following, to-wit:

Appeal Bond.

Know all men by these presents, That we, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, as principal, and Karl H. Caldwell as sureties, are held and firmly bound unto Fletcher K. Williams, trustee in bankruptcy of Harry P. Brown, a bankrupt, in the full and just sum of two hundred dollars, to be paid to the said Fletcher R. Williams, trustee as aforesaid, certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this sixth day of June, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the district court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said court, between Emil A. Huttenbauer and others as plaintiffs and Harry D. Brown, defendant, a decree was rendered against the said W. H. Gazley, H. F. Gazley, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn, and the said W. H. Gazley, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Fletcher R. Williams, trustee, as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the fifth day of July next.

Now the condition of the above obligation is such, that if the said W. H. Gazlay, H. F. Gazlay, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, shall prosecute their appeal to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. H. GAZLEY, [SEAL.]
H. F. GAZLAY, [SEAL.]
HULDA G. MILLER, [SEAL.]
EMMA G. DONALDSON, [SEAL.]
JULIA G. STEWART, [SEAL.]
CLARA G. KUHN, [SEAL.]
By OSCAR W. KUHN, *Att'y.* [SEAL.]
KARL H. CALDWELL. [SEAL.]

Sealed and delivered in presence of
ROB'T C. GEORGI,
As to Karl H. Caldwell only.

Approved by
J. K. RICHARDS,
U. S. Circuit Judge.

June 6, '06.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, Benjamin R. Cowen, clerk of the District court of the United States of America, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the controversy had between Fletcher R. Williams, trustee, and William H. Gazlay, *et al.*, in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the

seal of said court, at the city of Cincinnati, Ohio, this 8th day of June, A. D., 1906.

B. R. COWEN, *Clerk,*
[SEAL.] By ROB'T C. GEORGI,
Deputy Clerk.

31 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To Fletcher R. Williams, trustee in bankruptcy of Harry P. Brown, a bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the * fifth day of July next, pursuant to a petition for appeal filed in the clerk's office of the District court of the United States for the Southern District of Ohio, Western Division, wherein W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this sixth day of June, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirtieth.

J. K. RICHARDS,
U. S. Circuit Judge.

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* Not exceeding 30 days from the day of signing.

Cincinnati, O., June 6, 1906.

Service of the within process is hereby waived and appearance entered for all purposes as fully as if served with a copy of said citation.

FLETCHER R. WILLIAMS, *Trustee,*
By POGUE & POGUE, *Att'ys of Record.*

No. 3775. Bankruptcy. United States District Court, Southern District of Ohio, Western Division. Emil Huttenbauer, *et al., vs.* Harry D. Brown. Citation. Filed June 8, 1906, at 9 o'clock. B. R. Cowen, Clerk.

32 United States Circuit Court of Appeals for the Sixth Circuit.

And afterwards, to-wit: on the 15th day of June, A. D., 1906, an entry was made on the journal of said court clothed in the words and figures as follows, to-wit:

Journal C, Page 301.

No. 1578.

W. H. GAZLEY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee.

Before Lurton and Severns, C. JJ., and Cochran, D. J.

This cause is submitted on briefs without oral argument.

And afterwards, to-wit: on the 16th day of June, A. D. 1906, a decree was entered in said cause clothed in the words and figures as follows, to-wit:

Journal C, Page 302.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1578.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

33 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: on the 30th day of July, A. D. 1906, an opinion was filed in said cause clothed in the words and figures as follows to-wit:

Opinion.

34 Filed Jul- 30, 1906. Frank O. Loveland, Clerk.

No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry D. Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Submitted June 15, 1906; Decided July 16, 1906.

Before Lurton and Severens, Circuit Judges, and Cochran, District Judge.

COCHRAN, District Judge, delivered the opinion of the court:

This appeal involves a controversy which arose in the course of the involuntary proceeding in bankruptcy against one Harry D. Brown, pending in the lower court. It is a controversy between the appellee, his trustee in said proceeding, and the appellants, who are lessors in a certain lease under which, at the time of the institution of said proceeding, said bankrupt held a certain leasehold estate.

The lease covered certain premises on the east side of Vine street, between Fifth and Sixth streets, Cincinnati, Ohio, known as the Majestic Café. It was executed July 16, 1902, was for a period of ten years from July 7, 1902, with the privilege of renewal for an additional ten years, and was upon an annual rental of $7,000,
35 payable monthly, to secure payment of which a lien was retained in the lease on the leasehold estate thereby granted. The original lessee was one Joseph D. Kueny, and the bankrupt acquired the leasehold estate by purchase at a judicial sale in a suit brought by appellants, lessors in said lease, against said Kueny in the Superior Court of Cincinnati to enforce said lien. Suit was brought April 9, 1904, and the sale was had and confirmed in June and July, 1905. Pending the suit the premises were in charge of a receiver. The petition in said suit sought a sale of the leasehold estate, "subject to the terms, covenants and conditions contained" in said lease, but the order of sale and confirmation contained no such provision. Said Brown, immediately upon his purchase, entered into possession, made extensive improvements on the property and paid the rent regularly until January 1, 1906. On January 17, 1906, said bankruptcy proceedings were instituted against him and on same date the appellee, Fletcher R. Williams, was appointed receiver therein. An

Journal C, Page 301.

No. 1578.

W. H. GAZLEY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee.

Before Lurton and Severns, C. JJ., and Cochran, D. J.

This cause is submitted on briefs without oral argument.

And afterwards, to-wit: on the 16th day of June, A. D. 1906, a decree was entered in said cause clothed in the words and figures as follows, to-wit:

Journal C, Page 302.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1578.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

33 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: on the 30th day of July, A. D. 1906, an opinion was filed in said cause clothed in the words and figures as follows to-wit:

Opinion.

34 Filed Jul- 30, 1906. Frank O. Loveland, Clerk.

No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry D. Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Submitted June 15, 1906; Decided July 16, 1906.

Before Lurton and Severens, Circuit Judges, and Cochran, District Judge.

COCHRAN, District Judge, delivered the opinion of the court:

This appeal involves a controversy which arose in the course of the involuntary proceeding in bankruptcy against one Harry D. Brown, pending in the lower court. It is a controversy between the appellee, his trustee in said proceeding, and the appellants, who are lessors in a certain lease under which, at the time of the institution of said proceeding, said bankrupt held a certain leasehold estate.

The lease covered certain premises on the east side of Vine street, between Fifth and Sixth streets, Cincinnati, Ohio, known as the Majestic Café. It was executed July 16, 1902, was for a period of ten years from July 7, 1902, with the privilege of renewal for an additional ten years, and was upon an annual rental of $7,000,
35 payable monthly, to secure payment of which a lien was retained in the lease on the leasehold estate thereby granted. The original lessee was one Joseph D. Kueny, and the bankrupt acquired the leasehold estate by purchase at a judicial sale in a suit brought by appellants, lessors in said lease, against said Kueny in the Superior Court of Cincinnati to enforce said lien. Suit was brought April 9, 1904, and the sale was had and confirmed in June and July, 1905. Pending the suit the premises were in charge of a receiver. The petition in said suit sought a sale of the leasehold estate, "subject to the terms, covenants and conditions contained" in said lease, but the order of sale and confirmation contained no such provision. Said Brown, immediately upon his purchase, entered into possession, made extensive improvements on the property and paid the rent regularly until January 1, 1906. On January 17, 1906, said bankruptcy proceedings were instituted against him and on same date the appellee, Fletcher R. Williams, was appointed receiver therein. An

adjudication was had on February 19, 1906, and on February 27, 1906, appellee was elected trustee. Upon his appointment as receiver, appellee took possession of the premises and he has been in possession ever since, as receiver until February 27, 1906, and as trustee since then. On February 1, 1906, appellee as receiver paid the rent for the month of January, and on March 6, 1906, as trustee, he paid it for the month of February. Both payments were made to the appellant, W. H. Gazlay, who was acting as agent for all the lessors. Said leasehold estate was appraised as part of the assets of said bankrupt at the sum of $10,000. The controversy which arose in said proceeding concerned the leasehold estate in said premises under said lease held by appellee and in particular the character of his title thereto. The lease contained a provision in these words:

"Provided, however, that if said rent or any part thereof shall remain unpaid for — days after it shall become due without demand therefor; or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns is first
36 had; or if said lessee or assigns shall fail to keep any of the other covenants of the lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything contained on the said lessors' behalf to be done and performed shall cease, determine and be void."

It was not contended by appellants that said provision affected the passage of the leasehold estate from Kueny, the original lessee, to said Brown, by virtue of the proceedings in the Superior Court of Cincinnati, or its passage from said Brown to appellee upon his appointment as trustee, as of the date of the adjudication. But it was contended by them that a sale by appellee of said leasehold estate for the benefit of the creditors of said Brown would, because of said provision, operate as a forfeiture thereof, and that thereupon they would be entitled to enter and repossess themselves of the premises, and they seem to have notified appellee from the time of his appointment as receiver that they would not consent to such sale.

In view of this contention on the part of appellants, the appellee, on March 1, 1906, filed a written application in the lower court in said bankruptcy proceeding to have appellants brought before the court, the character of his title to said leasehold estate determined and it quieted from the adverse claims of the appellants. Subpœna issued upon the application and was served upon all of the appellants. They appeared and moved the court to dismiss the application for want of jurisdiction in it to so proceed against them and dispose of their claim. This motion and the merits of the controversy were referred to the referee, who upheld the jurisdiction of the court and decided against appellants' claim. The matter was then brought before the lower court by a petition for review, which confirmed the order of the referee and dismissed the petition. This appeal is from that action of the lower court.

No point is made here as to that court not having jurisdiction to so proceed against appellants and dispose of the controversy between them and appellee. It is well settled that it had such jurisdiction. Whitney *v.* Wenman, 198 U. S. 539.

37 Nor is any point made as to the appellee's right to have the validity of the appellants' claim heard and determined in advance of a sale by him of the leasehold estate. His application to that end was in the nature of a bill to remove a cloud on his title. Blair *v.* City of Chicago, 210 U. S. 400.

The arguments here relate solely to the merits of the controversy. The appellee maintains, on several grounds, that a sale by him of the leasehold estate for the benefit of creditors will not work a forfeiture thereof. He contends that this case comes within the rule laid down in Dumpor's case, 4 Coke 119*b* (1 Smith's Lead. Cases 15). That rule is that where a lease is upon a proviso that the lessee shall not alien without the special license of the lessors, if the license is once given, the condition is annulled, removed or destroyed, that is, has spent its force, so that it can have no effect on a subsequent alienation. Here the interest of Kueny, the original lessee, was sold to said Brown by the procurement of appellants. This, it is urged, exhausts the condition and brings the case within the rule stated. On the other hand, it is contended by appellants that their case is prevented from coming within the rule by the fact that in their petition in the State Court they sought a sale of the unexpired term of the leasehold estate, "subject, however, to the terms, covenants and conditions contained" in the lease.

It is to be noted in this connection that the sale that was had was one that was contemplated by the lease, in that a lien was retained therein on the leasehold estate created thereby to secure payment of the rent.

Appellee contends further that the acceptance of the rent for January and February from the appellee as receiver and trustee was a waiver of the right to claim a forfeiture in case of a sale by the appellee. In answer to this contention, it is urged by the appellants that appellee as trustee took title to the leasehold estate, the passage of the title thereto from the bankrupt to him not being affected by the condition in the lease, and therefore he had a right to pay the rent and appellants were bound to accept it.

The other ground relied upon by appellee is that a sale by him as trustee for the benefit of creditors is not forbidden by the
38 condition and will, therefore, not be a breach thereof, even though the case does not come within the rule in Dumpor's case. In other words, treating the case as if Brown were the original lessee and not the assignee of Kueny through judicial proceedings, such a sale is not so forbidden and hence will not be such a breach. It was on this last ground that the lower court placed its decision in favor of the appellee. Inasmuch as we think the lower court was correct in this position, it is not necessary for us to dispose of the other two grounds relied on.

Covenants against assignment and underletting contained in leases having the force of conditions are not favored by the courts.

Jones on Landlord *v.* Tenant Sec. 464, thus states the attitude of the courts towards such covenants:

"Covenants against assignment or underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessees so as to prevent the restriction from extending any further than is necessary."

Judge Earl in the case of Riggs *v.* Pursell, 66 N. Y. 193, puts it more strongly. He says:

"Such covenants are restraints which courts do not favor. They are construed with the utmost jealousy and very easy modes have always been countenanced for defeating them."

This attitude of disfavor, however, does not permit resort to sophistical reasoning to read out of such a covenant that which it really contains. It simply requires that what is claimed to be within it shall be clearly and manifestly so, and that if there is a felt doubt as to its being within it, that it be excluded therefrom. The cases go very far towards holding that the mere letter of the covenant is controlling.

Illustrations of this attitude and how far it has led courts to go are abundant in the reported cases. As, for instance, it has been held that an underletting is not a breach of a covenant against assignment, Jackson *v.* Silvernail, 15 Johns. 277; that an assignment is not a breach of a covenant against underletting, Field *v.* Mills, 33
39 N. J. L. 254, though there are other cases holding to the contrary of this; that a sublease of a part of the premises is not a breach of a covenant against underletting the premises, Roosevelt *v.* Hopkins, 33 N. Y. 81; that placing one in charge of the leased premises as servant or care taker to look after it during the landlord's absence is not a breach of a covenant against assignment or subletting, Presby *v.* Benjamin, 166 N. Y. 377; that a mortgage of a leasehold interest and judicial sale under the mortgage is not a breach of a covenant against assignment, it being the law of New York where it was so decided that a mortgage is not a transfer of the legal title or the possession but a mere security, Riggs *v.* Pursell, *supra;* that a delivery of a lease or security for money loaned operating as an equitable mortgage of the term secured by the lease is not a breach of a covenant not to let, set, assign, transfer, set over or otherwise part with the premises devised in the lease, Doe *v.* Hogg, 4 Dowl & Ry., 266; that a sale under execution against the tenant is not a breach of a covenant against assignment or underletting, Farnum *v.* Hefner, 79 Cal. 575; that an assignment by an assignee appointed in voluntary proceedings in insolvency is not a breach of a covenant not to lease, underlet or permit any other person to occupy, Bemis *v.* Wilder, 100 Mass. 446; and that an assignment by one of two joint lessees is not a breach of a covenant against assignment by the lessee, Randol *v.* Scott, 110 Cal. 590.

Dumpor's case and those cases applying the rule laid down in it are likewise illustrations of this attitude and the extent to which it has taken the courts. Concerning this case, Jones on Landlord and Tenant, Sec. 471, says:

"In the United States the rule in Dumpor's case while subject to

some adverse criticism has generally been received as settled law, though in many of the cases where the topic arose no actual decision upon the precise point was necessary."

This brings us to the case in hand. It is not necessary to consider the condition in question further than it relates to the assignment of the leasehold estate. It prohibits both voluntary and involuntary assignments. In so far as it prohibits voluntary assignments
40 the language is "if said lessee shall assign this lease;" and in so far as it prohibits involuntary assignments the language is "or if said lessee's interest therein shall be sold under execution or other legal process."

It is certain that passage of the leasehold estate from the bankrupt Brown to the appellee as of the date of adjudication was not a breach of either branch of the condition. It was a passage by operation of law and not by the act of the bankrupt; and the passage was not through the medium of a sale. Indeed, it is not argued by appellants that such passage was a breach of the condition. On the contrary it is conceded that it was not and it is argued therefrom that the acceptance of the rent from the receiver and trustee was not an anticipatory waiver of a breach thereof by a sale by appellee for the benefit of creditors. This then being true, *i. e.* that the passage of the leasehold estate from the bankrupt to appellee was not prohibited by the condition, it would seem that a sale by the appellee for the benefit of the creditors is not prohibited thereby. It is hardly reasonable that the parties to the lease could have intended that such a passage was allowable and yet that a sale by appellee was not, at least, without specially providing that it was not. The sole purpose of the acquisition by the trustee in bankruptcy of the assets of the bankrupt is to reduce them to money and distribute the proceeds amongst the creditors; and he has no right to hold them for any other purpose except temporarily.

And a consideration of the language of the condition shows that a sale by appellee of the leasehold estate is not within its terms. It is not within the voluntary branch thereof, because if it may be said to be a voluntary assignment, it is not an assignment by "said lessee." It is not within the involuntary branch thereof, for though it may be said to be an involuntary assignment and, possibly also a sale under legal process it is not a sale of "said lessee's interest." It is a sale of the appellee's interest held by it for the benefit of creditors and which passed to it notwithstanding the condition, by virtue of the bankruptcy proceeding.

The case nearest to the one in hand which we have found is that of Doe *v.* Bevan, 3 M. & S. 353.
41 The covenant there was one that the lessee, his executors, administrators or assigns, would not assign the indenture or his or their interest therein, or assign the premises to any person whatsoever. The covenant was simply against voluntary assignment, but it took in not only the lessee but also his assigns. The lessee deposited this lease as security for money borrowed and became bankrupt and the lease was sold by direction of the chancellor to pay that debt. It was held that the assignees under the commis-

sion in bankruptcy might assign the lease to vendee without forfeiture. Lord Ellenborough said:

"The courts have construed it to mean voluntary assigns as *contra* distinguished from assigns by operation of law and further than that, that the immediate vendee from the assigns in law is not within the proviso; the reason of which is that the assignee in law cannot be incumbered with the engagements belonging to the property he takes, such as in this case, the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property and convert it into a fund for the benefit of creditors."

Le Blanc, J., said:

"There can be no doubt that the lessee might have relieved himself from all inconvenience by expressly providing in the lease that if the lessee should become bankrupt or shall deposit the lease with any one then the lease should be void."

And again:

"It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach, but the assignees under the commission have assigned. They were bound to assign because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of creditors; and they are compelled under the order of the court of chancery to sell it in discharge of the debt of Whitbread & Co."

Bayley, J., said:

"It has never been considered that the lessee's becoming
42 bankrupt was an avoiding of the lease within this proviso; and if it is not, what act has the lessee done to avoid it? All that has followed upon the bankruptcy is not by his act, but by operation of the law transferring his property to his assignees. Then shall the assignees have capacity to take it and yet not to dispose of it; shall they take it only for their own benefit or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Instances of where the covenants involved expressly covered the bankruptcy of the lessee as well as sales of his estate under execution or other legal process may be found in the following cases, to-wit: Davis *v.* Eyton, 7 Bing. 154; Doe *v.* David, 5 Tyrw. 126; *In re* Ells, 98 Fed. 967.

The action of the lower court is therefore affirmed.

43 And afterwards, to-wit: on the 8th day of November, A. D. 1906, a petition for appeal was filed in said cause clothed in the words and figures following, to-wit:

Petition on Appeal of W. H. Gazlay et al.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, HANNA F. GAZLAY, EMMA G. DONALDSON, HULDA G. MILLER, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, Bankrupt, Appellee.

Petition on Appeal of W. H. Gazlay; Hanna F. Gazlay; Hulda G. Miller; Emma G. Donaldson; Julia G. Stewart; and Clara G. Kuhn.

The above named W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn, considering themselves aggrieved by the judgment made and entered on the 16th day of June, 1906, in the above entitled cause, do hereby appeal from said judgment to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed
44 and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

OSCAR W. KUHN,
Attorney for Appellants.

The foregoing claim of appeal is allowed.

HORACE H. LURTON,
Senior Circuit Judge.

And afterwards, to-wit: but on the same day, an assignment of errors was filed clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, HANNA F. GAZLAY, EMMA G. DONALDSON, HULDA G. MILLER, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, Bankrupt, Appellee.

Assignment of Errors.

Now comes W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein, and having asked for the allowance of an appeal from the

decree herein against them, assign for errors in said decree
45 and the proceedings of the Court therein the following.

First. That the said Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, ordering that the petition of the said W. H. Gazlay *et al.* to review the findings and orders of the Referee in Bankruptcy should be dismissed.

Second. That the Court erred in affirming the finding of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the Trustee in bankruptcy herein because, he was not expressly named in the prohibition against alienation in said lease.

Third. That the Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants could not assert the right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against
46 J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on execution or other legal process without the written consent of the lessors, the appellants herein.

Fourth. That the Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, W. D., that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from and claim or right on the part of appellants to forfeit same in the event of a sale.

Wherefore these appellants pray that the finding and decree of the Court against them be reversed and held for naught and that the said Court may be directed and ordered to enter such a decree as is proper.

OSCAR W. KUHN,
Solicitor for Appellants.

47 And afterwards, to-wit: but on the same day an order was entered on the journal of said court clothed in the words and figures as follows, to-wit:

Journal C, Page 329.

No. 1578.

W. H. GAZLAY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee of Harry *P.* Brown, Bankrupt.

Petition for appeal to Supreme Court is submitted by Mr. Oscar Kuhn and the court took the same under advisement. And thereupon the appeal is hereby granted and bond fixed at the sum of $250.00.

And afterwards, to-wit on the 15th day of November, A. D. 1906 a bond was filed in said cause clothed in the words and figures as follows, to-wit:

Know all men by these presents, That we, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn as principals, and Oscar W. Kuhn and Eugene C. Pociey, as sureties, are held and firmly bound unto Fletcher R. Williams, as Trustee in Bankruptcy of Harry D. Brown, a
48 bankrupt in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said Fletcher R. Williams as Trustee aforesaid, his certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November in the year of our Lord one thousand nine hundred and Six.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said Court, between W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn as appellants and Fletcher R. Williams as Trustee of Harry D. Brown, a bankrupt, appellee, a decree was rendered against the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn and the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in
49 the aforesaid suit, and a citation directed to the said Fletcher R. Williams as Trustee aforesaid citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C. on the — day of —— next.

Now the condition of the above obligation is such, That if the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn shall prosecute their appeal to effect, and answer all damages and costs if they fail to

make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. H. GAZLAY,
H. F. GAZLAY,
HULDA G. MILLER,
EMMA G. DONALDSON,
JULIA G. STEWART,
CLARA G. KUHN,
By OSCAR W. KUHN,
Attorney in Fact.
OSCAR W. KUHN.
EUGENE C. POSIEY.

Sealed and delivered in the presence of—
——— ———.
——— ———.

Approved by—
HORACE H. LURTON,
Circuit Judge.

50 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To Fletcher R. Williams, Trustee in Bankruptcy of Harry D. Brown, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the * 15 day of December next, pursuant to an appeal, filed in the Clerk's Office of the U. S. Circuit Court of Appeals, Sixth Circuit, wherein W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of November, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and 31st.

HORACE H. LURTON,
Circuit Judge.

* Not exceeding 30 days from the day of signing.

51 CINCINNATI, OHIO, *November* 17, 1906.

Received this writ at Cincinnati, Ohio, on November 16, 1906, and on the same day served same on the within named Fletcher R. Williams, Trustee, etc. by leaving a true copy of this writ, with the

endorsement thereon, at his usual place of residence, in the hands of his wife,—at Cincinnati, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON, *Deputy.*

Fees.

1 service	$2.00
1 copy	.30
2 miles	.12
Total	$2.42

Marshal's Civil Docket No. 3897.

52 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the original citation in the case of W. H. Gazlay, *et al. vs.* Fletcher R. Williams, Trustee, No. 1578, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of November A. D. 1906.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 20,478. U. S. circuit court appeals, 6th circuit. Term No. 513. W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller *et al.*, appellants, *vs.* Fletcher R. Williams, trustee of Harry D. Brown, bankrupt. Filed December 6, 1906. File No. 20,478.

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 513.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Petitioners,

vs.

FLETCHER R. WILLIAMS, as Trustee in Bankruptcy for HARRY D. BROWN, a Bankrupt,

Respondent.

Motion for a Writ of Certiorari.

Now come W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, by Oscar W. Kuhn, their counsel, and move this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn were appellants and the said Fletcher R. Williams, as Trustee in Bankruptcy for Harry D. Brown, a bankrupt, was appellee; and to that end they now tender herewith their petition upon the certified copy of the entire record in said cause in said Court of Appeals and now here before this Honorable Court in said cause, numbered 513 on the docket of this Court.

OSCAR W. KUHN, Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 513.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,
Petitioners,

vs.

FLETCHER R. WILLIAMS, as Trustee in Bankruptcy for HARRY D. BROWN, a Bankrupt,
Respondent.

Petition of W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn for a writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination the appeal in bankruptcy taken by said petitioners herein against the respondent herein, in the matter of W. H. Gazlay et al., appellants, vs. Fletcher R. Williams, as Trustee in bankruptcy for Harry D. Brown, Bankrupt, appellee, lately depending in the said Court of Appeals.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the above-named petitioners respectfully shows and states:

First. That on the 16th day of July, 1902, the above-named petitioners executed to one J. D. Kueny a lease for ten years, with privilege for ten years additional, on certain premises in the city of Cincinnati, Ohio; that on the 9th day of April, 1904, they brought suit against said J. D. Kueny for rent due under said lease and for the sale of said leasehold estate, subject to all of the terms, covenants and conditions contained in said lease; that in said proceedings said leasehold estate was sold to one Harry D. Brown, who took possession and paid the rent under said lease to petitioners until the institution of the proceedings in bankruptcy against him in January, 1905; that in said bankruptcy proceedings the respondent herein was duly elected and qualified as the trustee in bankruptcy for said Harry D. Brown, and as such elected to

assume and administer as a part of the assets of said bankrupt the unexpired term of said lease.

Second. That the above-named respondent as such trustee in bankruptcy did, on the first day of March, 1906, file in the office of the Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, sitting in bankruptcy in Cause No. 3775, entitled Emil Huttenbauer et al., plaintiffs, vs. Harry D. Brown, bankrupt, defendant, his certain application, asking for the sale of said leasehold estate, and alleging that the said petitioners herein and others were claiming interests in said leasehold estate adverse to that of the said respondent herein as trustee of the said Harry D. Brown, and asking that they be made parties to said application and required to set up their said claims, or be forever barred from asserting same.

Third. That said petitioners filed a motion in said proceeding to be dismissed as parties to said proceeding on the ground of want of jurisdiction in said Court over their persons, which motion the referee in bankruptcy overruled and to which action of the referee they took exception. That thereupon they filed their answer, in which they alleged that they had no interest in said leasehold estate except in the event of a sale of same by said trustee, when they would have the right to forfeit same by virtue of a covenant contained in said lease providing that in case the lessee's interest in said lease should be sold under execution or other legal process without the written consent of said lessors first had, it would be lawful for lessors (petitioners) into said premises to re-enter and to have again, re-possess and enjoy as in their former estate; and thereupon the lease should cease, determine and be utterly void, and again asking to be dismissed as parties to said proceeding.

Fourth. That upon a hearing by said referee of said application, the answers thereto of these petitioners, and an agreed statement of facts as evidence, it was held that said Court had jurisdiction over the persons of these petitioners, and that the trustee in bankruptcy, the respondent herein, had the right to sell said leasehold estate discharged of the said condition against forfeiture.

Fifth. That your petitioners thereupon filed with said referee a petition to review his said findings and order, and said referee certified the said proceedings, evidence and exhibits to the Judge of the District Court of the United States for the Southern District of Ohio, Western Division, in bankruptcy, who, upon hearing, affirmed the findings of the said referee, holding that said Court had jurisdiction in the matter and that the trustee had the right to sell said leasehold estate free of any right on the part of these petitioners to forfeit same for the reason that there was no provision in said lease for a forfeiture of it in the event of a sale by the trustee in bankruptcy of lessee, and that therefore a sale by respondent herein would violate no covenant in said lease.

Sixth. That, feeling themselves aggrieved by this judgment and

believing that under the provisions of the Bankruptcy Act and the decisions of this Honorable Court in several cases, the right was given them to do so, your petitioners appealed from this judgment of the District Court, to the United States Circuit Court of Appeals for the Sixth Circuit, where the cause was heard upon the same pleadings, exhibits and evidence without objection as to the appeal, and where the judgment of the District Court was affirmed.

Seventh. That your petitioners, again feeling themselves aggrieved by this judgment of said Circuit Court of Appeals, and believing that by virtue of the decisions of this Court they had the right to appeal from said judgment to this honorable Court, did, on the 6th day of December, 1906, file in this Court their appeal from the said judgment of the said Circuit Court of Appeals, together with their assignment of errors and the transcript of the record in said case, and same has been docketed in this Court as Cause No. 513 of the October, 1906, Term of this Court, and the record in said cause has been printed and is now on file in said cause.

Eighth. That while your petitioners believe that the questions to be determined in this cause as between themselves and the respondent herein are "a controversy arising in a bankruptcy proceeding" as distinguished from a mere "proceeding in bankruptcy," and that therefore their appeals from the District Court to the Circuit Court of Appeals and from the Circuit Court of Appeals to this Court were correctly taken, nevertheless, as the matter is not entirely free from doubt, it is respectfully prayed that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, therein entitled W. H. Gazlay et al., appellants, vs. Fletcher R. Williams, Trustee, appellee, and that the record in said cause, numbered 513, now on file in the office of the Clerk of this Court, and printed as aforesaid, be considered by this Court as the return to this writ, and that said case may be reviewed and determined by this Court under this proceeding in case this Court should decide that petitioners had no right to come to this Court by way of appeal.

Your petitioners further allege that they assign for errors in said decree and the proceedings of said Circuit Court of Appeals the following:

First: Said Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, in Bankruptcy, in holding that your petitioners would have no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of said respondent herein, for the reasons: First, that said respondent was not expressly named in the prohibition against alienation contained in said lease; and, second, that your petitioners, by their proceedings against J. D. Kueny in the Superior Court of Cincinnati, in which said leasehold was sold to

Harry D. Brown, the bankrupt, had forever discharged the lease from the condition contained in it, providing for a forfeiture of it in case the lessee's interest should be sold on execution or other legal process, without the consent in writing of the lessors first had.

Second. Said Court also erred in affirming the judgment of said District Court in holding that the trustee in bankruptcy herein was entitled to sell said leasehold estate clear and free from any claim or right on the part of your petitioners to forfeit the same in the event of a sale of same by said trustee under his said application.

Wherefore, these petitioners pray that upon a hearing of this cause by this Court the findings and decree of said Circuit Court of Appeals may be reversed and held for naught and that this Court may enter such decree as is proper.

W. H. GAZLAY,
HANNA F. GAZLAY,
HULDA G. MILLER,
EMMA G. DONALDSON,
JULIA G. STEWART,
CLARA G. KUHN,
By OSCAR W. KUHN, *their attorney.*

STATE OF OHIO, County of Hamilton, ss:

W. H. Gazlay, being first duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and the facts herein stated are true to his own knowledge, except as to such matters as are therein stated on his information and belief, and as to these he believes them to be true.

W. H. GAZLAY.

Subscribed and sworn to before me this 31st day of May, 1907.

A. J. FREIBERG,
Notary Public in and for Hamilton County, Ohio.

[NOTARIAL SEAL.]

Office Supreme Court, U. S.
FILED.
DEC 23 1907
JAMES H. McKENNEY,
CLERK

No. 164.

Supreme Court of the United States

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,
Appellants,

versus

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,
Appellee.

Brief on Behalf of Appellants.

OSCAR W. KUHN,
Counsel for Appellants.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

No. 164. *vs.*

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

Brief on Behalf of Appellants.

STATEMENT OF THE CASE.

On the 16th day of June, 1902, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein and hereinafter called the lessors, entered into a written agreement with one J. D. Kueny, whereby in considera-

tion of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situated on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional. (See record, pages 10 to 13.)

The lease contains the following condition:

> "Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine, and be utterly void."

On the 9th of April, said lessors filed a petition in the Superior Court of Cincinnati, Ohio, and thereby began a suit against the said J. D. Kueny for the recovery of rent due under said lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, *and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants and conditions contained in the lease from*

said plaintiffs to said J. D. Kueny" (Record, p. 7). Thereupon the court appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property including said leasehold estate was sold to H. D. Brown, who took possession of same, made extensive improvements thereon and paid to the lessors the rent reserved under said lease, from the time he took possession, to-wit, July, 1905, to January, 1906, when proceedings were begun against him in the U. S. District Court for the Southern District of Ohio, Western Division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown and on March 1st, 1906, he filed in the bankruptcy proceedings an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same. Subpoenas were issued and served upon all but one of the lessors on March 5th, 1906, and on that one on March 9th, 1906.

On March 6th, 1906, said trustee paid to W. H. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. There-

upon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy, and exception thereto taken by said lessors. Thereupon the lessors filed an answer in which, still denying the jurisdiction of the court over their persons,they alleged that as their claim was founded upon the clause in the lease providing "that if lessee's interest should be sold under execution or other legal process without the written consent of said lessors, it would be lawful for the lessors to repossess themselves of said premises, and thereupon the lease should be void," and that as the event therein provided had not happened they had no interest in or claim upon said leasehold estate at that time, and asked to be dismissed as parties to said application.

The case was then submitted to the referee upon these pleadings an agreed statement of facts (Record, pp. 6 to 10), the arguments and briefs of counsel.

Whereupon the referee found that the trustee being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforceable only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening, and he thereupon held that the lessors had no right as against the trustee in bankruptcy herein to forfeit the lease in the event of a sale by him under the

court's order and ordered said trustee to sell same free from any claim or right on the part of said lessors to forfeit same. To these findings and this judgment of the referee, the lessors took exception and filed a petition for a review of same in the District Court in Bankruptcy. The referee certified his proceedings to the District Court of the United States for the Southern District of Ohio, Western Division, where, upon a hearing on the same pleadings (except that appellee filed a reply to appellants' answer), and facts, an order was made affirming the findings and judgment of the referee, and dismissing the said petition for review.

From this judgment of the District Court, the lessors took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. There the cause was again submitted upon the same pleadings and facts upon which it was submitted to the District Court, and that court affirmed the judgment of the District Court affirming the judgment of the referee and wrote an opinion which is set out in full in the record herein (Record, pp. 31 to 37), the point of their decision being that the clause in said lease providing for its forfeiture in case of a sale of same under execution or other legal process without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy and that therefore the lessors could not forfeit the lease in case the trustees herein should sell same.

From this judgment of the Circuit Court of Appeals, the lessors have prosecuted an appeal to this court, and have filed herein all of the pleadings, exhibits and the

evidence, together with their assignments of error—all of which have been printed and are before the court.

ASSIGNMENTS OF ERROR.

Said assignments of error are as follows:

First. The said court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, ordering that the petition of the said W. H. Gazlay et al to review the findings and orders of the referee in bankruptcy should be dismissed.

Second. The court erred in affirming the finding of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the trustee in bankruptcy herein, because he was not expressly named in the prohibition against alienation in said lease.

Third. The court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants could not assert the right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on

execution or other legal process without the written consent of the lessors, the appellants herein.

Fourth. The court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from any claim or right on the part of appellants to forfeit same in the event of a sale.

After said appeal was filed in this court, some question having been made as to their right to appeal, appellants filed and submitted a petition for a *writ of certiorari*, asking the court if it should find that the appeal was not well taken, to order certified to this court a complete transcript of the record and all the proceedings of the Circuit Court of Appeals in said case and to review and determine the case under that proceeding.

This petition for a *writ of certiorari* was filed in accordance with the practice of this court as allowed in the cases of *Whitney, Warden,* v. *Dick*, 202 U. S., 132; *Pullman Palace Car Co.* v. *Cent. Transp. Co.*, 171 U. S., 138; *Security Trust Co.* v. *Dent*, 187 U. S., 237, 239. Afterwards appellee filed and submitted a motion to dismiss the appeal on the ground that it was not taken in time. Appellants filed a brief in answer to said motion showing not only that the appeal was prosecuted in time but also as a matter of right. Decision on this motion of appellee to dismiss and on the petition of appellants for a *writ of certiorari* was postponed until the hearing of the cause.

The court is respectfully referred to the brief of appellants in answer to appellee's motion to dismiss, for

the reasons why said appeal was not only taken within time but rightly so, and no argument upon these matters is made in this brief.

ARGUMENT.

It will be well to point out at the outset of the argument that the lease involved in this case contains two provisions against alienation—one against a voluntary assignment of it, *i. e.*, by the act of the lessee and the other against an involuntary assignment or sale of it on execution or other legal process, and that it is only with the provision against a sale of it under execution or other legal process with which this case is concerned.

This being premised, the questions presented for determination by this court are:

1st. Is the condition of said lease that "if lessee's interest therein shall be sold under execution or other legal process, without the written consent of the lessors, their heirs or assigns, is first had, it shall be lawful for said lessors into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate and that thereupon this lease shall cease, determine and be utterly void," a valid condition, and

2d. If so, have the lessors the right to forfeit the lease in case the trustee in bankruptcy herein sells the same upon his application for an order to do so?

I.

THERE CAN BE NO DOUBT UNDER THE AUTHORITIES THAT, AS BETWEEN THE ORIGINAL PARTIES TO THIS LEASE, THE CONDITION, VIZ., "THAT IF LESSEE'S INTEREST SHOULD BE SOLD UNDER EXECUTION OR OTHER LEGAL PROCESS WITHOUT THE LESSORS' WRITTEN CONSENT, IT MIGHT BE FORFEITED BY THE LESSORS," WAS A LAWFUL AND VALID CONDITION AND, IN THE EVENT OF SUCH A SALE, WOULD HAVE RENDERED THE LEASE VOIDABLE IN THE HANDS OF THE PURCHASER.

Farnum v. *Heffner*, 79 Cal., 575.
Rex. v. *Tapping*, McClel. & Y., 544.
Davis v. *Eyton*, 4 M. & P., 820.
Doe v. *Clark*, 8 East., 185.
In re Ells, 98 Fed. Rep., 967.
Tiffany on Real Property, p. 106.
1 Taylor Landlord and Tenant, 409.

II.

HAVE THE LESSORS THE RIGHT TO FORFEIT THIS LEASE IN THE EVENT OF ITS SALE BY THE TRUSTEE HEREIN UNDER HIS APPLICATION FOR AN ORDER OF THE COURT TO DO SO, *i. e.*, IS THE ABOVE CONDITION STILL IN FORCE AS BETWEEN THE LESSORS AND THE TRUSTEE IN BANKRUPTCY?

Whether the lessors may or may not forfeit the lease in case of a sale of it by the trustee will depend upon the title that Brown, the bankrupt, took under his purchase from the receivers in the Superior Court proceedings; *i. e.*,

upon whether he took the lease *subject to* or *free from* the condition relating to a sale under legal process.

From the agreed statement of facts it appears that the lessors themselves filed the petition in that case, asking for a sale of the leasehold estate of the original lessee Kueny, to pay their claim for rent under the lease, "*subject, however, to all of the terms, covenants and conditions contained in said lease.*"

This was a written request by the lessors that the lease should be sold subject to all of its terms, covenants and conditions, and it may even be conceded that it was a written consent to its sale upon those terms; but neither in the petition nor in any other pleading in the case did the lessors request or consent to the sale of the leasehold estate free from such terms, covenants and conditions.

Upon this petition an order was issued out of said court directing the receivers to sell the leasehold estate, and under said order it was sold to Harry D. Brown; but the order of sale did not *in terms* provide that it was to be *subject to all of the terms, covenants and conditions of the lease;* nevertheless, it is submitted, that the purchaser, Brown, took the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, for the reasons:

1st. That the court's order must be construed to follow and harmonize with the pleadings in the case, and to grant only such relief as the pleadings and the facts of the case warranted. Therefore, when the order issued, directing a sale of the "leasehold estate," it must

necessarily have contemplated the leasehold estate the sale of which was asked for in the petition, and which was a leasehold estate *subject to all of the terms, covenants and conditions of the original lease;* and, indeed, such a sale was the only one to which the plaintiffs were entitled under the petition and the other pleadings in the case.

2d. That when two constructions of a decree are possible, a court must adopt the one which will accomplish the objects and purposes of the suit rather than the one which will defeat them.

Since the petition in the Superior Court case asked for the sale of the leasehold estate subject to all of the terms, covenants and conditions of the lease, it is manifest that the objects and purposes of the suit were the enforcement of the lessors' lien for rent by a sale of the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, in order that the lessors could still control the character of the tenancy of the premises and prevent its falling into objectionable or irresponsible hands, which it was the purpose of the provision requiring the lessors' written consent to the assignment or sale of the leasehold estate, to accomplish.

A sale of the leasehold estate, *subject to all of the terms, covenants and conditions of the lease*, was the only kind of a sale that would accomplish these objects and purposes, while a sale free from the terms, covenants and conditions of the lease would defeat those objects and purposes. Therefore we must construe the decree for sale as directing a sale *subject to the terms, covenants and conditions of the lease.*

Again, since the lessors did not give their written consent to a sale free from the terms, covenants and conditions of the lease, it follows that a sale free from those terms, covenants and conditions would have given the purchaser a title that would be voidable at the option of the lessors; while a sale subject to the terms, covenants and conditions of the lease would have given him a title that would not be voidable at the option of the lessors, and it therefore follows that the court's decree must be construed so as to confer a good title rather than one that is voidable only.

In view of the foregoing, it is submitted that by every intendment of the parties to the Superior Court case, and by every reasonable construction of the proceedings in it, Brown, the purchaser, took and held the leasehold estate *subject to all the terms, covenants and conditions of the original lease.*

That the sale of a leasehold estate subject to all of the terms, covenants and conditions of a lease, may be lawfully made, and when so made the purchaser takes the lease subject to such terms, covenants and conditions, was held in the case of *Kew* v. *Trainor*, 150 Ill., 150.

Having thus established that Brown took the leasehold estate subject to all of the terms, covenants and conditions of the lease, it remains to consider what effect his bankruptcy had upon his title.

The lease contains no provision for its forfeiture in the event of the bankruptcy of the lessee, therefore Brown's bankruptcy was not a violation of any of the provisions of the lease. Nor was the passing of Brown's

title to his trustee in bankruptcy a violation of any of the provisions of the lease relating to an assignment or sale of it, because this passing of the title to the trustee was accomplished not by a voluntary assignment nor by a sale under execution or other legal process, but solely by force of the Bankrupt Act, Sec. 70 (*a*) and therefore the lessors had no right to forfeit the lease in the hands of the trustee.

Watson v. *Merrill*, 14 Am. Bank. Rep., 453-458.
In re Curtis, 9 Am. Bank. Rep., 286.
In re Pennewell, 9 Am. Bank. Rep., 490.
Farnum v. *Hefner*, 79 Cal., 575.

But since, as has been shown, Brown held the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, which made it liable to be forfeited in the event of its sale under legal process without the written consent of the lessors, and since the title of the trustee in bankruptcy is the same as that of the bankrupt, Brown, it follows that the trustee holds the title to the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, and a sale of it by him under legal process without the lessors' written consent will make it liable to be forfeited in the hands of any purchaser at such a sale.

York Mfg. Co. v. *Cassell*, 201 U. S., 344.
Thompson v. *Fairbanks*, 196 U. S., 516.
Hewitt v. *Berlin Machine Works*, 194 U. S., 296.
Bankruptcy Act, Section 70 (*a*).

A sale of the leasehold estate by the trustee under his application for an order to sell will be a sale under legal

process, and since, as was shown above, the trustee holds the leasehold estate subject to all the terms, covenants and conditions of the lease, it follows that any such sale will be a breach of the condition relating to a sale under legal process and will give to the lessors the right to forfeit the lease in the hands of the purchaser.

Hence when the court below held that a sale of the leasehold estate by the trustee would not be a violation of any of the terms, covenants and conditions of the lease, it committed error for which its judgment, authorizing the trustee to sell, should be reversed.

The Circuit Court of Appeals held in this case that a sale of the leasehold estate by the trustee would be no breach of the condition in the lease relating either to a voluntary assignment of it or to a sale of it under execution or other legal process, because, since the lease made no provision for its forfeiture in case of the bankruptcy of the lessee, nor in case of the passing of the title to the trustee, and since the trustee's holding was solely for the purpose of sale, it could not have been in the contemplation of the parties to the original lease that a trustee in bankruptcy should be permitted to take the title to the leasehold estate, and yet not be permitted to dispose of it, at least without expressly providing that he should not (Record, p. 35).

This holding of the court, it is respectfully submitted, is not tenable for the following reasons:

1st. *It destroys and utterly nullifies the contract between the parties to the lease.*

The parties to the original contract of lease provided in it for its forfeiture in the event of any transfer of it whatsoever without the written consent of the lessors. Insofar as a voluntary transfer of it was contemplated the provision was "if lessee should assign the lease or underlet said premises or any part thereof," and insofar as it contemplated an involuntary transfer, the provision was "if said lessee's interest therein shall be sold under execution or other legal process."

A sale by a trustee in bankruptcy must be accomplished either by a voluntary transfer of the lease, *i. e.*, by an act of the trustee himself or by an involuntary transfer of it, *i. e.*, by an order of the court, which is by legal process; hence to exempt a sale by the trustee under legal process from the general clause prohibiting the sale would be not only wholly unwarranted but would be making a contract which the parties never made or intended.

2d. *It is in direct conflict with the holdings of this court in the cases of York Mfg. Co.* v. *Cassell, Hewitt* v. *Berlin Machine Works, and Thompson* v. *Fairbanks, supra, that the title of a trustee in bankruptcy is the same as that of the bankrupt; i. e., is subject to the same limitations and infirmities to which it was subject in the bankrupt's hands.*

Brown's title being, as shown above, subject to forfeiture in case of an assignment of the lease or in case of a sale under legal process without the lessors' written con-

sent, if the trustee's title is not subject to forfeiture in the event of a sale under legal process, it would give to the trustee greater rights in the leasehold estate than the bankrupt Brown had, which is contrary to reason and the decisions of this court, *supra*.

3d. *It opens the door to fraud.*

For a provision in a lease of the kind under consideration here could be evaded simply by the institution of bankruptcy proceedings against the lessee when the provisions would at once become inoperative and a transfer of the lease could be made notwithstanding objection on the part of the lessors.

4th. *It is not supported by the case of Doe* v. *Bevan, 3 M. & S., 553, upon which it was predicated by the court.*

For that was a case in which the provision in the lease relating to its alienation was expressly made to apply *only* to the case of a voluntary assignment by the lessee. It did not provide in any way for a forfeiture of it in the event of a sale under execution or other legal process, as is the case in the lease under discussion, and which is the sole question under consideration here.

The English court rightly held in that case that a sale by an assignee in bankruptcy would be no violation of the clause preventing an assignment of the lease by lessee or his assigns, because that clause contemplated a voluntary assignment only, while a sale of the lease by the assignee in bankruptcy was a purely involuntary proceeding, and not being forbidden by the lease furnished no ground upon which the lessor might forfeit.

There is nothing either in the facts of that case, nor in the opinions of the four lords who decided it, that has any bearing upon the facts in this case. For here we have an express clause in the lease providing for a forfeiture of it in case of an involuntary assignment or sale of it, which a sale under execution or other legal process would clearly be, which as above stated, was not in the lease which was before the court in the case of *Doe* v. *Bevan.*

5th. *It is based upon a mere assumption, viz: that the trustee in bankruptcy holds the title to the bankrupt's property solely and exclusively for the purpose of a sale of it.*

Section 47 of the bankruptcy act, which prescribes the duties of trustees, provides under subdivision (*a*) (2) that they shall collect and reduce to money the property of the estates for which they are trustees, under direction of the court. And Section 70 of the act, enumerating the cases in which a trustee takes title to the property of the bankrupt, provides under Subdivision (*a*) that "the trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the banbrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (5) *property, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.*

Having conclusively shown above that the title of the bankrupt, Brown, to the leasehold estate was only a qualified title, that is, was one that was subject to forfeiture in the event of an assignment of the lease by him or of a sale of it under execution or other legal process without the lessors' written consent thereto, it follows from the express provisions of Section 70 (*a*) of the bankruptcy act, viz., that the trustee in bankruptcy shall be vested with *the* title of the bankrupt, that he, the trustee, took and now holds the leasehold estate of the bankrupt, Brown, also subject to forfeiture in the event of an assignment or sale of it under legal process, without the written consent of the lessors.

To hold, therefore, that a trustee in bankruptcy takes the title to the bankrupt's property solely and exclusively for the purpose of a sale of it is in direct conflict with the express provisions of the bankruptcy act and a mere assumption.

Hence, from all of the foregoing, it is submitted, that the Circuit Court of Appeals erred in its judgment that a sale of the lease by the trustee in bankruptcy would be no breach of the condition in said lease relating to a sale of it under legal process, and that in case of such a sale by the trustee, the lessors, the appellants herein, would have no right to forfeit the lease in the event of such a sale by the trustee, and this court is respectfully asked to reverse that judgment.

Oscar W. Kuhn,

Counsel for Appellants.

Cincinnati, December 12th, 1907.

Office Supreme Court, U. S.
FILED.
JAN 7 1908
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART AND CLARA G. KUHN,

APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

PROVINCE M. POGUE,
OF COUNSEL FOR APPELLEE.

NO. 164.

Supreme Court of the United States.

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT, Appellee.

BRIEF ON BEHALF OF APPELLEE.

Having been advised by the Clerk of this Court that on October 28, 1907, this Court

> "Entered its order in case of Gazlay et al. vs. Williams, Trustee, etc., No. 164, Oct. Term, 1907, postponing both the motion to dismiss and the petition for certiorari until the case is reached for hearing on the merits,"

I trust it is my privilege to file a brief covering:

First. A reply to the brief of the appellants on the motion of the appellee to dismiss the appeal.

Second. Objections to allowing the writ of certiorari.

Third. The merits of the case.

I.

REPLY TO THE BRIEF OF THE APPELLANTS ON THE MOTION OF THE APPELLEE TO DISMISS THE APPEAL.

Just as Court convened on October 21, 1907, I was handed by the clerk a copy of a brief for the appellants in opposition to the motion to dismiss the appeal. Previous to that hour I had not the slightest intimation that counsel for appellants intended to file any brief on this motion, although my brief, heretofore filed and to the argument in which reference is made without repetition, had been served on him months before, as is shown by the official service on file in the offices of the clerk. Therefore, I had no opportunity to reply in writing or otherwise at the time of the hearing and submission of the motion to dismiss the appeal.

Counsel for appellants has cited only one authority in opposition to the motion to dismiss the appeal because it was not filed in time. It is the case of Hewitt vs. Berlin Machine Works.

That case did not have under consideration the question as to the time within which an appeal should be taken from the Circuit Court of Appeals nor was there anything of that kind involved in the proceedings. This is one of the essential points in the motion to dismiss the appeal; that is, the question of time, and while it may have been proper to have taken an appeal in the form as provided for in the act cited by counsel for the appellants, yet, under the statutes and the rule made by this Court, in accord therewith, the appeal in this case must be taken within thirty days.

Counsel for appellants says that Rule 36 does not apply to an appeal from the Circuit Court of Appeals, and that it applies only to an appeal from the District Court or Circuit Court to this Court. I do not know how I can make English any clearer than by repeating the rule, which says "Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals . . . shall be taken within thirty days after the judgment or decree."

This clearly shows that the rule does apply to appeals from the Circuit Court of Appeals, and I insist applies to the case at bar.

Further this appeal should not be entertained, because the record does not show the findings of fact and conclusions of law to have been made by the Circuit Court of Appeals in accordance with Clause 3 of General Order No. 36, reading as follows:

> "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

No findings of fact or conclusions of law were made in the case by the Circuit Court of Appeals, nor do the records show that there was any request to make any such finding. The appeal was a general one and in accordance with the recent opinion of this Court in the case of Chapman vs. Bowen, decided November 11, 1907, this appeal should be dismissed.

I submit the appeal was not prosecuted in time, as urged in my brief on the motion to dismiss, nor was it prosecuted in proper form.

II.

OBJECTION TO ALLOWING THE WRIT OF CERTIORARI.

On the 16th day of June, 1906, the decree was entered in the Circuit Court of Appeals.

This Court convened in October, 1906, and held a continuous session until the latter part of May, 1907. In all that period no application was made by the appellants for a writ of certiorari. It was not until after the Court had adjourned, to-wit, June 13, 1907, that an application was made, within four days of the expiration of a year from the time of the judgment in the Circuit Court of Appeals. While I am cognizant of the fact that this Court in the case of the Conquerer, 166 U. S., 114, has made a ruling that the application for the writ of certiorari, made in that case within a year, was a reasonable time, yet I do not believe that that ruling should be allowed to apply to the same character of writs in bankruptcy cases. The purpose of the bankruptcy act is to shorten the proceedings as much as possible, so as to bring all of the proceeds of the bankrupt into court and have a distribution made promptly.

This purpose of the bankruptcy act is further strengthened by Rule 36 of this Court, passed with reference to appeals, and if you consider the matter simply as to time, I submit that the act of the appellants in delaying the application for this writ for so long a period should not be countenanced, and that the writ should, therefore, not be granted by reason of their long delay.

Nor can the reason be important enough in this case to extend it to come within the opinion heretofore announced by this Court when it said:

> "Only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."
>
> Forsyth vs. Hammond, 166 U. S., 514.

The appellants should be governed as to their rights by the decision of the Circuit Court of Appeals, and this writ should not now be granted after so long a delay, and especially so when the appellants have prosecuted another proceeding and deliberately delayed filing the petition for a writ of certiorari, thereby preventing the parties from reaching a conclusion of this litigation at a date long prior to the time of this hearing. Such conduct and such delay should not be countenanced.

Where it becomes necessary, in the administration of the property of a bankrupt estate in the *possession of the trustee*, as in this case, to bring in third parties for the purpose of adjudicating the title or interest of such parties in that property, a proceeding instituted by the trustee to that end is not a controversy arising in bankruptcy, but is a proceeding in bankruptcy proper. That is the case at bar.

> First Nat. Bk. vs. Title & Trust Co., 198 U. S., 280.
> Whitney vs. Wenman, 198 U. S., 539.

In re McMahon, 147 Fed., 685.
Morgan vs. First Nat. Bk., 145 Fed., 466.

The decision of the court of bankruptcy under the facts just above mentioned can not be reviewed on appeal, but must be on petition for revision.

Louisville Trust Co. vs. Comingor, 184 U. S., 18.
Schweer vs. Brown, 195 U. S., 171.
First Nat. Bk. vs. Title & Trust Co., 198 U. S., 280.

Having sought to review this case, by a form of proceeding which they thought proper, and now realizing that that proceeding was not proper, they should not be permitted to tie up a bankruptcy case in this matter. They elected their remedy and should be estopped.

I respectfully submit the petition should not be granted.

III.

THE MERITS OF THE CASE.

STATEMENT OF THE CASE.

A statement of the case, so far as it was necessary for the purposes of the motion to dismiss the appeal, has already been made in the brief heretofore filed herein. For the present purposes I only desire to add to what has been said therein by calling the Court's attention to the fact that the appellants have not brought the entire record in this case to this Court or the Circuit Court of Appeals, as the same was before the district court and referee, because a number of the exhibits, 1 to 16, which are important, are missing. (Record 8.) So that this Court could not have under its consideration the evidence before the referee and district court, on which it based its findings. (Record, pp. 19, 20.)

ARGUMENT.

The points involved in the merits of the case may be divided for discussion under five heads:

First. The district court had jurisdiction and could make the lessors, the appellants, parties to this action to determine the matters in controversy.

Second. This was a proceeding in bankruptcy to determine the rights and claims of the lessors and the trustee as to their respective interests in the leasehold estate of the bankrupt, and was in the nature of a suit to quiet the title thereto in the trustee.

Third. If the district court had jurisdiction, then the lessors have lost their right of forfeiture, if a sale is made by the trustee in these proceedings, by reason of the action instituted by them in the Superior Court of Cincinnati, in which the leasehold estate of Kueny was sold at public auction without limit or reserve by the said Superior

Court to Harry D. Brown, the bankrupt, who took possession and paid rent.

Fourth. Again, after the receiver in bankruptcy took hold, after the trustee had been chosen by the creditors and qualified, after the trustee had elected to take absolutely the leasehold estate for the purposes of sale, and after these very proceedings had been instituted to quiet the title preparatory to a sale, the lessors received rent from the bankrupt estate through F. R. Williams, receiver, and F. R. Williams, trustee, without objection. Thereby, they waived their right of forfeiture and the trustee can sell free from such right of forfeiture.

Fifth. There is no provision in the lease for a right of forfeiture by reason of a sale in bankruptcy, and, therefore, even though all other provisions of the lease were preserved, this sale would not entitle the lessors, appellants, to forfeit the lease if the trustee sold.

FIRST.

THE DISTRICT COURT HAD JURISDICTION AND COULD MAKE THE LESSORS, THE APPELLANTS, PARTIES TO THIS ACTION TO DETERMINE THE MATTERS IN CONTROVERSY.

Chapter 2, Bankrupt Act, Sec. 2, provides:

> "That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, are hereby made courts of bankruptcy and are hereby invested, with their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation chambers and during their respective terms, as they are now or may be hereafter held."

Sec. 2, pt. 6:

> "Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

Sec. 2, pt. 7:

> "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Sec. 2, pt. 15:

> "Make such orders, issue such process and enter such process in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It is conceded that the trustee is in lawful possession of the property in controversy, but the claim is made that such possession is for a limited purpose only—that is, that while he can hold the leasehold property indefinitely he can not utilize it in the only way that a trustee can utilize property—that is, convert it into cash for distribution to the creditors.

This is clearly a matter in controversy with relation to the most essential duty of the trustee, that of collecting, reducing to money and distributing the estate in his hands, and it can only be determined by the presence of the parties who raise the controversy.

It is no different from the numerous cases of contests as to the character of the possession of the property claimed by third parties which would ordinarily be the subject of the proceedings in the nature of replevin, which have come to be called petitions for reclamation.

Whitney vs. Wenman, 198 U. S., 539.
First Nat. Bk. vs. C. T. & T. Co., 198 U. S., 280.
White vs. Schloerb, 178 U. S., 542.

The district court had the power to bring in and substitute additional parties when necessary for the complete determination of the matter in controversy, realize on this valuable asset of the estate by converting it into money and then distribute it among the creditors.

Hewitt vs. Berlin Machine Works, 194 U. S., 296.
York Mfg. Co. vs. Cassell, 201 U. S., 344.
Mueller vs. Nugent, 184 U. S., 1.
Bryan vs. Bunheimer, 181 U. S., 188.

In view of the decisions of this Court, I submit that the district court had jurisdiction to bring in and substitute the additional parties, the lessors, the appellants, in order to determine the matters in controversy in this bankruptcy proceeding.

SECOND.

THIS WAS A PROCEEDING IN BANKRUPTCY TO DETERMINE THE RIGHTS AND CLAIMS OF THE LESSORS AND THE TRUSTEE AS TO THEIR RESPECTIVE INTERESTS IN THE LEASEHOLD ESTATE OF THE BANKRUPT, AND WAS IN THE NATURE OF A PROCEEDING TO QUIET THE TITLE THERETO IN THE TRUSTEE.

This proceeding was instituted on March 1, 1906, by the trustee against all the persons claiming interests in this leasehold estate. In order that the trustee might place a well-defined and clear title in any purchaser, he filed his proper plea, making the lessors, the appellants, and the mechanics lienholders, parties defendant by order of the lower court. Summons were issued and the various parties answered, including the appellants, but the only issues for review are between the

lessors and the trustee. This proceeding is like a suit to quiet title. The trustee has possession and is conceded by the lessors, the appellants, to have absolute possession, having elected to take the lease with its value and terms with the full intention to sell it pursuant to the appraisement made by the appraisers of the district court.

The Revised Statutes of Ohio, Sec. 5779, provide for a proceeding to quiet title as follows:

> "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse interest."

Here the trustee claims an estate in this leasehold for a fixed period free from certain conditions or covenants and that he can transfer it to a purchaser without the consent of the lessors; whereas, the lessors, the appellants, claim that, although the ~~lessors~~ trustee can hold it as long as the lease runs, free from the rights of forfeiture set forth and quoted fully above, but if he sells and transfers it, they, the lessors, can step in and take possession and oust the purchaser. This Court can readily see that if the trustee made any attempt to transfer it with this cloud hanging over his title, he would realize little or nothing for it; whereas, if it is freed from such right of forfeiture, he would no doubt realize the full appraised value, $10,000, or more.

The Supreme Court of Ohio had a case very similar to this in an action brought by a person claiming a fee when there was another party claiming he had only a life estate. The claim in that case was, like this, of adverse title.

Rhea vs. Dick, 34 O. S., 420.

In an application made by a trustee under the English bankruptcy act in the case of in re Riggs, 2 K. B., 16 (1901), the court had to determine the rights of the trustee in a certain lease involving questions of similar import—a proceeding to quiet title.

In a case in Michigan the Supreme Court of that state had before it a bill very similar in character to the proceeding instituted in this bankruptcy case. It was a suit brought by the lessor to have the court declare whether or not his forfeiture was complete, because the lessees would set up certain claims that it was complete, and in that case the court held that it was a proper suit in equity to quiet the title.

Pendill vs. Union Mining Co., 64 Mich., 172, 179.

In the case at bar we have just the reverse purpose, in that the trustee in bankruptcy, acting for the creditors, has brought a proceeding to quiet the title in him as trustee, and that the respective rights in the leasehold estate between himself and the lessors be determined.

Since this case was tried before the referee this Court has had under consideration a bill brought by receivers ancillary to the original bill to determine whether or not the city of Chicago could exercise a

certain right of forfeiture on the 30th day of July, 1903. This Court saw in that case, as it must in this case readily see, that until the respective rights are determined between the parties, there is a serious question as to whether or not the trustee has any title that he can convey so as to realize the value for the creditors. In the Chicago case the receivers, in order to determine their claims against the city of Chicago, brought an ancillary bill to determine their rights as against the city's rights in the franchise for the operation of the street railway system in that city. This Court, deciding the case in favor of the receivers that such a bill could be maintained to remove the cloud from the title, cite numerous authorities, and held:

> "Without going into further detail upon this branch of the case, we think that the latitude and claims of the city cast a cloud upon the title to this property, which was in the hands of the receivers to be administered under the orders of the court, and that in such case the receivers may with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers."
>
> Blair vs. Chicago, 201 U. S., 400.

I therefore submit, in accordance with the foregoing authorities, that this was a proper proceeding to quiet title between adverse claimants and that the lower court was justified in considering it, and the bankruptcy court had jurisdiction in such matters.

THIRD.

IF THE DISTRICT COURT HAD JURISDICTION, THEN THE LESSORS HAVE LOST THEIR RIGHT OF FORFEITURE, IF A SALE IS MADE BY THE TRUSTEE IN THESE PROCEEDINGS, BY REASON OF THE ACTION INSTITUTED BY THE LESSORS, THE APPELLANTS, IN THE SUPERIOR COURT OF CINCINNATI, IN WHICH THE LEASEHOLD ESTATE OF KUENY WAS SOLD AT PUBLIC AUCTION WITHOUT LIMIT OR RESERVE BY THE SAID SUPERIOR COURT TO HARRY D. BROWN, THE BANKRUPT, WHO TOOK POSSESSION AND PAID RENT.

If the lessors had a right to insist on a forfeiture they have waived it by their subsequent acts and conduct since the right of forfeiture arose.

The owners of this leasehold estate, the parties now contesting, brought a suit in April, 1904, in the Superior Court of Cincinnati, Hamilton County, Ohio, a court of competent jurisdiction, to sell this property; it was advertised for sale and was sold at public auction without limit or reserve, in July, 1905, and it was bid in by Mr. Brown

(Record, pp. 7, 8). Subsequent thereto Mr. Brown paid rent on the property up to the time of the proceedings by the creditors (Record, pp. 6-10). In view of these acts of the lessors they have no right of forfeiture whenever the trustees desires to sell.

The original leading case on the subject of conditions and covenants in leases is Dumpor's Case, 4 Coke, 119; 1 Smith Leading Case, 95, 117.

All subsequent decisions on this subject ultimately reach back to this old case as the basis for the law as it stands today.

Taylor on Landlord and Tenant, Sec. 287, 407, 498.
Murray vs. Harway, 56 N. Y., 339.
Lloyd vs. Crispe, 5 Taunton, 249, 253.
McGlynn vs. Moore, 25 Cal., 384.
Deaton vs. Taylor, 90 Va., 209, 295.

The most recent textbook in existence on the subject of landlord and tenant, and which has been published since the first of January, 1906, is the work of Jones on Landlord and Tenant. At Sec. 471 of this work he says:

> "In the United States the rule in Dumpor's case, while subject to some criticism, has generally been received as settled law, though in many of the cases where the topic arises no actual decisions upon the precise point was necessary."

Sustaining this proposition in the memorandum of authorities which I submitted to the court at the hearing below, I cited several cases. Many of them are very recent, and I especially direct the Court's attention to the decision of the New York Court of Appeals, in the case of Conger vs. Duryea, 90 N. Y., 599, wherein the court stated:

> "A single condition dispensed with is dispensed with forever. Receiving rent after forfeiture waives the forfeiture and affirms the lease, freed from the condition. Thus, where the condition is that the tenant shall not assign the lease and he does assign it, and the landlord with knowledge of the assignment accepts the rent, he affirms the lease without its condition and the assignee of the tenant may assign."
>
> Conger vs. Duryea, 90 N. Y., 599.

The New York Court of Appeals in the very recent case of Smith vs. Rector of St. Phillip's Church, 107 N. Y., 610 (14 N. E. Rep., 828), concurring in the view originally expressed in Dumpor's case, approved it as good law.

I desire to direct the Court's attention to two very recent cases from Massachusetts, the syllabus from one of which is as follows:

> "A assigned the lease to B with consent, B assigned the lease

to C without the consent of the lessor. Held that the condition was waived by the lessor's acceptance of the rent from C."

Porter vs. Merrell, 124 Mass., 534.

In another case only a few numbers before the case just referred to from Massachusetts, the Supreme Court of Massachusetts laid down the principle exactly as I insist it should be laid down in this case, wherein it has stated, and in the opinion Justice Horace Gray, afterwards of the United States Supreme Bench, concurred, as follows:

"A condition in a lease that the lessee or his legal representatives can not alien without the consent in writing of the lessor is determined by an alienation with such consent and no subsequent alienation is a breach of the condition."

Pennock vs. Lyons, 118 Mass., 92.

While this proposition may strike opposing counsel as extraordinary, he is not alone in his wonder, for Lord Eldon says:

"Though Dumpor's case always struck me as an extraordinary one, it is the law of the land at this day."

He further says:

"My opinion, therefore, without considering the particular terms of the assignment, is that this assignee has the power of assigning without license."

Brumell vs. Macpherson, 14 Ves. Jr., 175, 176.

The purpose of such limitation in a lease that it was not to be transferred, assigned or sold may be considered to be twofold; first that the new tenant may be morally objectionable to the landlord, or, second, he may be financially objectionable to the landlord. I admit that if the clients of the opposing counsel had taken advantage of the forfeiture provision in their lease when it was sold by the Superior Court of Cincinnati, whether it related to an assignment without their consent or through a transfer of the property to Mr. Brown through legal process without their consent, the Court would have upheld them in their contention. They not only did not do that, but were the parties to bring the suit; alleging that rent was due them; asking that the property be sold; that a receiver take charge and preserve the property for sale. They consented in writing, as is stated in the entry appointing the receivers, that these receivers should take hold for the purpose of selling this property. This was certainly a sale in the Superior Court through legal process, that can not be disputed. This is not a continuing condition I submit on the authorities herein cited. When these very owners instituted the proceedings to sell Kueny's leasehold estate and did not take advantage of their forfeiture clause, the law will either construe them to have waived such a condition of the right of forfeiture through a legal process or that they are now estopped.

If the Court will examine the advertisement (Record 14) it will see that this was a sale at public auction where no restrictions were placed on the sale by the landlord, the plaintiff in the case. Every one was at liberty to bid for this property. It was sold at public auction after various attempts had been made to sell it at private sale; certainly they are estopped from exercising this condition now through the proceedings in the Superior Court.

The counsel for the lessors, the appellants, admit that the trustee is in lawful possession of the property as trustee and has elected to take under the lease and make no claim that his title has been affected by the condition as to re-entry,

> "If said lessee shall assign this lease or underlet said leased premises or any part thereof . . . without the written consent," etc.

It is conceded that the adjudication in bankruptcy passes the title to the leasehold by operation of law to the trustee, provided he elects to take as in this case, and is in no sense an assignment, even if the condition is regarded as still in force in the lease and applicable to assigns. The condition, however, as to assignment is in terms a single and indivisible ones that "*if said lessee shall assign,*" and there is no mention of the word assigns with relation to this condition. It plainly can refer only to the lessee, and it can hardly be contended that it refers to an assignment by any one other than the lessee in the original lease, Joseph D. Kueny.

So far as the covenant of the "lessee for himself and for his . . assigns . . that he will not assign this lease nor underlet said premises without the written consent of said lessors" is concerned, it is in the first place no part of the condition and therefore can not affect the title of the trustee nor any assign from the trustee, but it too is a covenant that the lessee will not assign, and does not refer to the assignment of any interest of an assignee. Covenants to not assign do not run with the land, not being covenants touching and concerning the land at all.

The covenant to repair or insure on or before a time certain, or forthwith, to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants, because the parties contemplated by such covenants to provide for the doing or omission of a single act.

Farmers L. & T. Co. vs. P. P. Glass Co., 186 U. S. 453.

As the Supreme Court of California has said:

> "The distinction between the two classes of covenants is well illustrated by the covenants against sub-leasing, and against the assignment of the term. If the lessee assigns contrary to his covenant, it is a breach once for all; but a forfeiture accrues to the lessor each time the lessee sub-leases the premises contrary to his

covenant. If the lessee should after his assignment, contrary to his covenant, procure a re-assignment of the lease to himself, a forfeiture would not be worked by his assignment the second time."

McGlynn vs. Moore, 25 Cal., 395.
Dougherty vs. Matthews, 35 Mo,. 520.

The consent to this breach and the waiver of it are admitted by the lessors, who claim, however, that the condition is a continuing one, binding upon all holders of the leasehold estate, and that, although waived as to Kueny, it had not been waived as to his successors.

The condition referring to the "lessee interest" refers as clearly only to the lessee Kueny as does the condition as to the assignment by the lessee, and therefore when that condition has been waived by the lessors as to Kueny it disappears from the lease. The words of the condition following, "if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept," the first condition in which assigns are mentioned, clearly indicate that it is those covenants which necessarily go with the occupancy under a lease, such as to "pay said rents," not to "suffer any waste," and to return the "said premises in as good order and condition as they now are," etc., that are to bind all successors of the lessees, as distinguished from the conditions that have express reference to the personality of the lessee, Kueny, those against assignment and the sale of the lessee interest under execution. If such is the case, the application to sell, which is practically a consent to an assignment, and the waiver of the sale have eliminated that breach and that condition, and the purchaser, Brown, takes the leasehold, not as a lessee but as the purchaser of the lessee's interest, subject to the conditions in the lease that naturally go with it by the terms. Had it been the intention to continue the restriction as to assignment and as to sale under execution, the lessors should have re-entered in the first instance and then made a new lease with Brown or such tenant as they desired to accept.

The condition is as single and indivisible as a condition that if the tenant shall cut down a certain tree or remove a certain building which, once cut down or removed, are gone forever. It is not the "lessee interest" that the trustee in bankruptcy desires to sell—that has already been sold—it is the interest of Brown, the bankrupt, the purchaser and successor of the lessee by consent of the lessors—an entirely different interest.

Doe exdem. Cheere vs. Smith, 5 Taunton, 795.
Philpot vs. Hoare, 2 Atk., 219.
Doe vs. Bevan, 3 Maule & S., 353.
Washburn Real Prop. (6th Ed.), Sec. 649.
Taylor on Landlord & Tenant (9th Ed.), 501, 410 and 286.
Tiffany Real Property, 72.
Winter vs. Dumerque, 12 Jur. N. S., 56.

The law should estop them for other reasons—namely, that having waived their right of forfeiture through sale by legal process, by their conduct one of the parties to this litigation has loaned a large sum for the purpose of reconstructing this building, and others have furnished material and performed labor on the building cognizant of such legal estoppel existing.

The principles of law applicable to a forfeiture always will be construed so as to prevent rather than aid a forfeiture.

Sauer vs. Meyer, 87 Cal., 34.
Camp vs. Scott, 47 Conn., 336, 375.
Tate vs. Crowson, 6 Ere. L. N. C., 65.
Parks vs. Hays, 92 Tenn., 161.

"The court leans against forfeitures."
In re Pennewell, 119 Fed. (C. C. A.), 139, 141.

In a case in Nebraska the principle was defined that where the subject of the forfeiture is valuable improvements owned by the tenant, forfeiture should be even less favored, and unless compelled by an unbending rule of law, the court of equity would not enforce forfeiture of property of considerable value belonging to the tenant.

Estebrook vs. Hughes, 8 Neb., 496.

I submit, under the foregoing authorities, that the law is well defined as to this case, that when the lessors did not insist on their right of forfeiture at the time of sale at public auction without limit or reserve by the Superior Court of Cincinnati, Ohio, and by taking the rent from the purchaser, Brown, the bankrupt, that the right to exercise the forfeiture through any subsequent sale or assignment, as lessors claim they can do, has been waived forever and the trustee can make a sale free from any such claim.

FOURTH.

AGAIN, AFTER THE RECEIVER IN BANKRUPTCY TOOK HOLD, AFTER THE TRUSTEE HAD BEEN CHOSEN BY THE CREDITORS AND QUALIFIED, AFTER THE TRUSTEE HAD ELECTED TO TAKE ABSOLUTELY THE LEASEHOLD ESTATE FOR THE PURPOSES OF SALE, AND AFTER THESE VERY PROCEEDINGS HAD BEEN INSTITUTED TO QUIET THE TITLE PREPARATORY TO A SALE, THE LESSORS RECEIVED RENT FROM THE BANKRUPT ESTATE THROUGH F. R. WILLIAMS, TRUSTEE, WITHOUT OBJECTION. THEREBY THEY WAIVED THEIR RIGHT OF FORFEITURE, AND THE TRUSTEE CAN SELL FREE FROM SUCH RIGHT OF FORFEITURE.

By accepting the rent from the trustee, who had previously elected to take, and started these proceedings to sell, they (the appellants) waived their right of forfeiture:

Taylor on Landlord & Tenant, Sec. 497 and 498, and authorities cited therein.
Wilder vs. Eubank, 21 Wend., 587.
Garnhart vs. Finney, 40 Mo., 449.
The Elevator Case, 17 Fed., 200.
Warner vs. Cochran, 128 Fed., 553.
Hasterlik vs. Olson, 75 N. E., 1,002 (Ill.).
Fleming vs. F. H. Co., 61 Atl., 157.

I claim that the sole purpose of the trustee in bankruptcy is to collect the assets of the bankrupt, convert them into money and distribute them among his creditors. The landlords never took advantage of the forfeiture clause by reason of legal process in the Superior Court, and I submit that by their conduct since these proceedings were instituted in bankruptcy they would be again estopped from taking advantage of this forfeiture clause for a sale through legal process. For, though I may concede that the holding of the receiver is temporary, and though he paid rent to the landlord, the holding of the trustee in bankruptcy now has been defined to be an election of the right to take for others interested in this property. Prior to the first day of March, 1906, these very proceedings, supplementary to the original proceedings, were filed in this case to complete the converting the bankrupt's property into money through sale. The placing of the property in the hands of the trustee in bankruptcy is for the purpose of sale. The title is vested in him when he elects to take any portion of the property for the purpose of sale. After these proceedings were instituted, March 1, 1906, and after the summons were served, the lessors, the appellants, demanded and received rent, as is undisputed, and placed no conditions therein. (Receipt, March 5, 1906, Record 10.) I submit that for this reason the lessors, the appellants, should be estopped from exercising any right of forfeiture under their lease.

FIFTH.

THERE IS NO PROVISION IN THE LEASE FOR A RIGHT OF FORFEITURE BY REASON OF A SALE IN BANKRUPTCY, AND, THEREFORE, EVEN THOUGH ALL OTHER PROVISIONS OF THE LEASE WERE PRESERVED, THIS SALE WOULD NOT ENTITLE THEM TO FORFEIT IF THE TRUSTEE SOLD.

By a person being declared a bankrupt I submit under the terms of the lease, whose provisions have been heretofore quoted, the lease is not forfeited.

In re Ells, 98 Fed., 967. (Lowell, J.)

Under the foregoing decision the court says there is no distinction between the old bankruptcy law and the new bankruptcy law on this subject. While there is a diversity of opinion on this subject, the weight of authority seems to be that the lease is not terminated, unless the trustee does not desire to hold it as a part of the estate or unless the landlord has the property turned over to him voluntarily, either through his own act or the act of the trustee.

In re Pennewell, 119 Fed., 139. (C. C. A.)
Loveland on Bankruptcy, 165 and authorities cited therein.
In re Houghton, 1 Lowell, 554.
Farnum vs. Hafner, 79 Cal., 580.
Smith vs. Putman, 3 Pickering, 221.
Doe vs. Bevan, 3 M. & S., 353
The Elevator Cases, 17 Fed., 200.
Gregg & Landis, 21 N. J. Eq., 494, 501 bot.

Suppose for the sake of argument that proposition fourth is not good, then I submit that when the title of the property which was originally in Brown was assumed by the trustee and he started his proceedings to quiet the title to sell the same, then the title did not pass by operation of the bankrupt law, but by the trustee's own election. Then the title which the trustee was conveying was the trustee's title. He is not attempting to convey any interest of Brown now, but his own title. No provision was made in the forfeiture clause of the lease against a sale in bankruptcy and a sale in such proceedings could not be construed to mean a sale through legal processes. In the case of

In re Ells, 98 Fed., 967,

they had the specific provision against a sale in a bankruptcy court, and the English Statutes and decisions have special provisions covering the English Bankruptcy Act. The sale of the trustee will be a title which he owns and holds, and the purchaser will take not from Brown, but from the trustee.

According to the theory of the argument of counsel for appellants, the trustee takes and has a right to sell only the title that the bankrupt possessed. If this argument were true in all of its details, then the sale by the trustee could not be a sale by legal process, but a sale in bankruptcy as distinguished from a sale by legal process, without having made any provision in the lease against a sale by a trustee in bankruptcy. As there is no provision for forfeiture for such a character of sale, which according to their theory is neither an assignment by lessee, nor a sale by legal process, then they would have no right of forfeiture.

I submit under this contention the trustee should be allowed to sell free from any forfeiture.

SIXTH.

ANSWER TO ARGUMENT FOR APPELLANTS.

Since the above brief was dictated and written, I have been served with a type-written copy of the brief that counsel for appellants propose to, and no doubt will, file in this Court.

I notice on examination of the brief, which is to be afterwards printed and filed, that it abandons, so far as that argument is concerned, further discussion of propositions first and second of my brief with reference to the jurisdiction of the court and the character of the proceedings. I do not know whether they intend to file any additional brief on this subject, or make any addition to their present type-written brief, but anticipating that they may, as they have not expressly abandoned them, I have covered propositions first and second, in order to meet such a contingency. If they abandon the argument with reference to the jurisdiction and the character of the action, either orally or in some subsequent brief, then I have nothing further to add on the subject, except as given under propositions first and second on the merits of the case.

After counsel for appellants have passed over the nature of their proceedings, they reduce their argument to two propositions. The first of these propositions with reference to the validity of a provision in a lease for forfeiture by reason of alienation, I do not dispute. I do dispute the second proposition, especially, when it is based on the facts as he attempts to give them.

Proposition three, four and five of my brief for the appellee cover the reply to their argument largely, but I desire to direct the attention of the court to certain special facts.

The court will notice on reading the order of sale made in the Superior Court (Record 14), that it was a sale at public auction without limit or reserve. A sale at public auction is a competitive sale made without limit or reserve to the highest bidder. Therefore, the purpose for whch the provision is put in the lease about assigning or selling the same by way of a legal process has been eliminated. A public auction allows any one to bid, who will pay the highest price and the auctioneer has to accept him, if he puts up the money covering the amount of his bid. It is immaterial whether he may be responsible morally for the proper conduct of the place or financially for future rent, which are the only purposes for which the provision is made in a lease, that it cannot be assigned or sold under a legal process or execution, without a written consent of the lessors, the appellants. By such a sale, as heretofore urged, there being no provision in the decree that the purchaser

must be acceptable to the landlord, the appellants, before such a sale becomes binding, this contention is thoroughly in harmony with the decree and the proceedings. If the appellants had intended to make any such reservation, it should have been made in the order of a sale, but none was made that they were to have the right to determine, who should be the tenant. The sale being made in the way that it was, nullified all the terms, covenants and conditions, whichever they may be called, with reference to assignments or sale under legal process.

As to the nature of this sale by the Superior Court of Cincinnati, counsel for appellants only cited one case, Kew vs. Trainer. He has abandoned the numerous authorities cited on this proposition in the lower courts, for the reason that they favored my contention. An examination of his only case will disclose the fact that there was a special license made by the landlord for the assignment, with the distinct understanding that it apply to only one person, and was therefore limited and could not be taken advantage of by any one else. The line of reasoning in that case would have no application to the present case, because of the fact that there was no restriction or stipulation in the sale at public auction, when Mr. Brown, the bankrupt, bought.

Again, I submit that the holding of the Circuit Court of Appeals is not in the least at variance with the case of York Manufacturing Company vs. Cassell or any other case cited by appellants, as to the nature of the trustee's leasehold. The cases in his brief were thoroughly familiar to the Circuit Court of Appeals before it rendered its decision in this case, and the decision of the Circuit Court of Appeals in this case is thoroughly in harmony therewith. The law is clear that when Brown became a bankrupt, that the trustee did not have to accept the lease, so that the trustee is not bound in the same way that Brown was, because Brown was bound with the obligations of the lease and had to fulfill it. It was optional with the trustee whether or not he would accept the leasehold estate, owned by Brown, and when he did accept it, it was accepted with the purpose of sale and with the purpose of making use of it for the benefit of the bankrupt estate. When the trustee did accept it and paid rent after these proceedings had been instituted to sell and the rent was accepted, as shown by the receipt (Record 10), without any stipulation opposed to his right, then he certainly occupied an entirely different relation from what Mr. Brown did to the appellants, before Brown became a bankrupt.

In this case there was no claim of fraud, and were a fraud practiced upon the landlord, the appellants in this case, the court would be justified in holding so. The proceeding of the trustee to convert the property into money was filed, summons were served regularly on these parties in this proceeding, that he intended to sell, and after the summons was served the rent was paid without objection and knowing such condition.

It is not an assumption that the trustee in bankruptcy holds the

property for the purpose of sale, but it is a fact that that is the purpose—namely, that it shall be converted into money and distributed among the creditors. Especially does this apply to a leasehold estate, because the trustee has the right to not accept the leasehold estate, if he so desires, or to accept, if he so desires. If he refuses to accept, it is evident that it is not a valuable asset. If the trustee does accept, it is evident that it is a valuable asset, and that he intends to use it, realizing a money consideration therefor. He would have no purpose in accepting it and becoming bound for the term, if it was not for the purpose of selling it.

The reasoning of the Circuit Court of Appeals, as contained in its opinion in the record, is clearly justified, and this Court would be justified in affirming it in accordance with its opinion.

However, if that opinion should not be held to be good law, I submit on the other propositions urged in this brief, namely, that by reason of the proceedings in the Superior Court of Cincinnati, the right of forfeiture was waived or by reason of the proceedings in this court, the service of summons and the acceptance of rent after these proceedings without objection, as is shown by the receipt, the right of forfeiture was waived and the trustee should be permitted to sell, free from any right of forfeiture on the part of the appellants.

I respectfully submit that the judgment of the Circuit Court of Appeals, if the Court shall consider the case at all on its merits, should be affirmed.

PROVINCE M. POGUE,
Of Counsel for Appellee.

Cincinnati, Ohio, Dec. 28, 1907.

NO.164.

Supreme Court of the United States.

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

I.

Not being advised by the rules of the court that more than one set of briefs can be filed on behalf of the appellants or appellee in this case, I had thought the printed argument concluded. However, I have been served with a reply brief for the appellants and do not think it just to my client to allow the same to pass unnoticed, especially as it makes statements which are thoroughly inconsistent with my previous statement and the record in this case.

In this reply brief counsel for the appellants state that I have made no effort to controvert his argument as to the nature of Brown's title. I did not think it necessary, nor do I now think it necessary, to make a diagram to show that the legal effect of the third proposition in my original brief on the merits of the case, answering the brief of the appellants, is that the title that Brown acquired, through the proceedings of the Superior Court of Cincinnati, was free from the term, covenant or condition of the lease, whichever it may be, entitling the lessors, the appellants, to forfeit by reason of a sale in this proceeding. That is the legal effect of the proceedings in the Superior Court.

Again, the fact is not that the lease was sold subject to the terms, covenants and conditions of the lease, as claimed by the appellants, but as shown by the original order of sale (top of

Record 15) the property—to-wit, the leasehold estate—was sold "at public auction," and I contend that when it was sold under such conditions, there being no reservation, either directly or indirectly, as to the right of forfeiture through a future sale, that the legal effect of such proceedings was to sell the property free from the right of forfeiture by reason of resale in the present proceeding.

It is immaterial what the lessors especially prayed for in their petition. The fact is, what was done under that petition or proceeding? No copy of the petition in the Superior Court is contained in the record, as it should have been had the case been brought properly to this court to be considered fully on its merits. As a matter of fact, the petition is one of the exhibits that was not printed or filed in the proceeding herein by the appellants and about which I have spoken. Not only is it a fact that the order to sell was made without any restriction, but the legal effect is that when it is sold without any restriction "at public auction," which means without limit or reserve, that it was sold free from the right of forfeiture notwithstanding certain other terms in the lease, as to its duration and the amount of rent to be paid, ran with the land.

Further, no exception was taken to this order of sale as to its form by the lessors. If they had desired to restrict the sale, as our authorities under proposition third in our former brief show, it should have been set forth in the order wherein the sale was made that the purchaser must be a party who would be approved by the landlord. There is no inconsistency in the order or decree made in the Superior Court nor in its construction to hold that the legal effect of such an order of sale is to eliminate from the lease the provision for the right of forfeiture by reason of that sale through a legal process or an assignment, whichever it may be designated. The reply to this line of argument contained in the reply brief for the appellants is fully covered as to the nature of Brown's title by proposition third in my original brief.

The only reply needed to the reargument beginning on page four of the appellants' reply brief is to refer the court to our proposition third that the action in the Superior Court and the sale at "public auction" nullified the provision of forfeiture in the lease.

The line of reasoning contained in the third proposition on page eight of the reply brief of the appellants might be subject to consideration if it were based on any facts contained in the case. It is not based on any facts, nor are there any facts in this case to which the decisions in Illinois would have any relevancy.

Coming now to the consideration of the fourth and last con-

tention made in the reply brief, beginning on page nine, I desire to call the court's attention to a fact which seems to have escaped the mind of the counsel for appellants, that the lessors, the appellants, had knowledge of this proceeding to sell.

The agreed statement of facts on page nine shows "that the rents due and payable to the lessor (the appellants) on March 1, 1906, were paid to them by Fletcher R. Williams on March 6, 1906." Now, the agreed statement of facts shows that on March 5, 1906, being the day before the rent was paid the lessors, the service of the subpoena in these proceedings was made on all of the appellants with the exception of Emma G. Donaldson, and that she was served on March 9, 1906. This service on March 9th necessarily related back and showed that these proceedings were instituted against Emma G. Donaldson on March 1st, and that she received the rent on March 6th, five days after the proceedings were started against her, and there is no record that she ever returned the rent, but it is admitted that she received it, so that she is bound equally with the others as to the fact in the case. The attempt to distinguish Mrs. Donaldson, as to this proposition from the other tenants, is entitled to no consideration by reason of the fact that she took the rent after the proceedings were instituted, and that she has held the rent after the service on her of the subpoena in this proceeding, begun before she ever received the rent. The case cited, as to the question of notice to one co-tenant not binding the others, does not apply to the facts as disclosed in this case, for the fact is that all of them received the rent alike, and the question of agency of W. H. Gazlay is not a matter of concern because the rents were paid to all of them—that is, to the lessors as above quoted from the record.

However, the payment of the rent to one was a payment to all, was a full discharge as to all and bound all alike.

Freeman on Co-Tenancy, Sec. 177 and 178.

If a notice to quit by one co-tenant binds all, equally should the notice to one co-tenant of the intention to hold and sell the property bind all.

Alford vs. Vickery, 1 Car & M., 280.
Kindersley vs. Hughes, 7 Mees & W., 141.
Aster vs. Summersett, 1 B. & Ad., 140.

"A notice to one joint contractor is binding upon all."

Detlor vs. Holland, 57 O. S. 492.
Baker vs. Kellogg, 29 O. S. 663.

As this lease was an Ohio contract and the foregoing decisions are of the court of last resort in Ohio and not a lower court in Ohio, as the authority cited by opposing counsel, then

they should govern in the construction of the contract of lease and the continuing its existence.

And, equally, so does the act done by one co-tenant—to-wit, the receiving the rent—in the name and as the act of his companion become binding on the latter from and after ratification thereof, as was the fact in this case.

Freeman on Co-Tenancy, Sec. 188.

II.

THE COURT HAS NO JURISDICTION OF THIS CAUSE BY REASON OF THE PROCEEDINGS BEING TAKEN BY APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, WHEREAS THE APPELLANTS SHOULD HAVE REVIEWED THE CASE BY ERROR PROCEEDINGS.

We desire to bring to the attention of the court, though under the practice of this court it may not be necessary, the consideration of a jurisdictional question and the form of their review in this case.

The court has noticed on an examination of the record that they appealed this case from the district court to the circuit court of appeals. (Record 25.) Then they appealed to this court. I filed a motion to dismiss the appeal and assigned as one ground "no jurisdiction of the cause." This ground the court could consider of its own volition without argument.

In his brief on the motion and petition for writ of certiorari he argues that this is "a controversy arising in a bankruptcy proceeding" as distinguished from a mere "proceeding in bankruptcy," and that it is, therefore, appealable. Now, I have argued in my brief on behalf of the appellee that this is a "proceeding in bankruptcy" and if this proposition should be maintained, as contained in my original brief beginning on page six, then the proceeding from the district court to the circuit court of appeals was improperly taken and the matters should have been reviewed through the supervisory powers of the court of appeals under section 24 b, and not considered by an appeal.

Therefore, proposition second being maintained under the decisions of this court, the appeal was not, but a petition to review was, the proper proceeding from the district court to the circuit court of appeals, and this court should dismiss the entire proceeding.

First National Bank vs. Chicago T. & T. Co., 198 U. S. 280.

In re McMahon, 147 Fed. 684, and the authorities therein cited.

I respectfully submit that the whole proceedings should be dismissed. This is aside from the merits of the case, which the court need not consider.

PROVINCE M. POGUE,

Of Counsel for Appellee.

Saturday, February 15, 1908.

Office Supreme Court, U. S.
RECEIVED
JAN 22 1908
JAMES H. MCKENNEY,
Clerk.

No. 164.

Supreme Court of the United States

OCTOBER TERM, 1907.

W. R. GAZLAY, SARAH F. GAZLAY, HELEN G. MILLER, EMMA H. MORALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER B. WILLIAMS, Trustee of Harry A. Brown, a Bankrupt,

Appellee.

Brief of Appellants in Reply to Appellee.

OSCAR W. KUHN,

Counsel for Appellants.

The Cooke Typical Press, Law Printers, 300 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES

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Appellee.

Brief of Appellants in Reply to Appellee.

In his brief, counsel for the trustee has made no effort to controvert the argument of counsel for the appellants that the title which Brown acquired in the leasehold estate under his purchase in the Superior Court proceedings was subject to all of the terms, covenants and conditions of the original lease between the lessors and Joseph D. Kueny, but has contented himself with the mere statement that Brown's title was free from the

terms, covenants and conditions of the original lease because the order of court, under which he purchased the leasehold estate, and which directed the receivers to sell it at public auction, did not in terms provide that it should be sold subject to those terms, covenants and conditions.

He advances no reason to show why the order, notwithstanding it did not direct the sale of the leasehold estate *free from* the terms, covenants and conditions of the lease, must nevertheless be construed in that way.

Nor is any authority cited by him in support of that view.

That such a claim is not tenable and, that the order of sale *must* be construed as directing the sale of the leasehold estate *subject to the terms, covenants and conditions of the lease*, the following reasons in addition to those already assigned in my first brief are submitted:

The lessors in their petition had asked specifically for the sale of the leasehold estate, subject to the terms, covenants and conditions of the lease, and for the appointment of receivers to make the sale in that way, and the right of the lessors to have it sold in that way had in nowise been questioned or controverted by any of the parties to the suit, so that the jurisdiction which the court took over the subject-matter of the suit was such only as was given to it by the petition; that is, a leasehold estate subject to all of the terms, covenants and conditions of the lease.

And since the receivers had been appointed immediately upon the filing of the petition, and by and with the consent of the defendant, Kueny, to take charge of the property brought into court by the petition, which included the leasehold estate with its terms, covenants and

conditions, and since no order had been made enlarging or in any way changing the nature and extent of the estate brought into court by the petition, it follows that when the order was taken by the receivers directing them to sell the leasehold estate (which order was only an interlocutory order and in no sense a final one), it referred to and could have referred only to the leasehold estate which the petition asked should be sold, and which the court had placed in the hands of the receivers pending the litigation, in accordance with the prayer of the petition, which was a leasehold estate subject to all of the terms, covenants and conditions of the lease.

Hence it is submitted that when Brown bought the leasehold estate from the receivers, it was the leasehold over which the court had acquired jurisdiction, viz: a leasehold estate *subject to all the terms, covenants and conditions of the lease* and not one that was free from them.

Moreover, even if the court had in express terms ordered the sale of the leasehold estate free from the terms, covenants and conditions of the lease, nevertheless the purchaser Brown would *not* have taken it free from those terms, covenants and conditions, because the order would have been void for want of jurisdiction in the court to make it, since, as above shown, the only subject-matter of which the court had jurisdiction was the leasehold estate *subject to* and not free from the terms, covenants and conditions of the lease.

But the order of court did *not* direct a sale of the leasehold estate *free from* the terms, covenants and conditions of the lease. Hence even if it be conceded that the order of sale was open to two constructions, one that the sale was to be made subject to and the other that it

was to be made free from those terms, covenants and conditions, then, as shown above, the construction that the sale was to be made subject to the terms, covenants and conditions of the lease *must* be the one adopted, because it is that construction only that will render the order legal and operative.

For when an order or decree of a court is susceptible of two constructions, one of which would make it legal and operative, while the other would render it illegal and void, a court *must* adopt the one that will make it legal and operative.

Armstrong v. *Grandin*, 39 O. S., 368.

It therefore follows that the sale was made subject to the terms, covenants and conditions of the lease, and was the only lawful way in which it could have been made, and that Brown so held the leasehold estate.

II.

Counsel for the trustee also maintains in his third proposition that the lessors have forever waived their right to forfeit the lease by accepting rent from Brown after he had taken possession under his purchase and by acquiescing in the improvements made by him upon the premises.

It is however submitted there neither was nor under the circumstances of this case could there have been a waiver by the lessors of their right to forfeit the lease by reason of their alleged acts and conduct with respect to the rent and the improvements for the following reasons:

1st. Since the lessors in their petition had asked for a sale of the leasehold estate subject to all of the terms, covenants and conditions of the lease and since no claim or adjudication had been made that the leasehold should be sold free from those terms, covenants and conditions, the lessors had the right to assume and believe that the sale was made in accordance with their request as set out in their petition, and that the purchaser took and was holding the title subject to the terms, covenants and conditions of the lease. Hence when they accepted rent from Brown and acquiesced in the improvements made upon the premises by him, they did so under the belief that he was holding the title subject to all of its terms, covenants and conditions, among which were the covenants to pay rent and to permit the making of improvements on the premises and under these circumstances they could have had no knowledge that by this conduct they were waiving any of their rights under the lease.

2d. It is nowhere shown by the evidence that the lessors had any notice or knowledge that Brown was holding or attempting to hold the title to the leasehold estate free from its terms, covenants and conditions or otherwise than subject to them; and since there can be no waiver of or acquiescence in a breach of condition without notice or knowledge of such breach on the part of the person against whom such waiver or acquiescence is asserted, the lessors have in no manner whatsoever waived or acquiesced in any breach even if it can be said there had been a breach.

Roe v. *Harrison*, 2 T. R., 425.
Crouch v. *Wabash R. R. Co.*, 22 Mo. App., 315.
18 Am. & Eng. Encyl. of Law (2d Ed.), 382.

It is therefore submitted that in no sense have the lessors waived their right to forfeit the lease by accepting rent from Brown, because their acceptance of it was without knowledge on their part of any prior breach as indeed there was none.

3d. However, assuming but not conceding that the law of waiver is correctly stated in the third proposition of counsel's brief, it has no application to the facts of this case. For, if the leasehold estate was sold not as requested by the lessors in their petition, but contrary to that written request, then they have nowhere consented *in writing* to such sale, and hence the rule in Dumpor's case and the cases following it are not in point here. For those cases hold that before a condition in a lease against alienation is dispensed with *forever*, the lessor must have consented to its alienation *in writing* and *without qualification*, and this was not done in this case and therefore on the facts of this case there could be no waiver.

Macher v. *Foundling Hospital*, 1 V. & B., 191.
Roe v. *Harrison*, 2 T. R., 425.
Richardson v. *Evans*, 3 Madd., 218.

4th. Further, even if the sale had been ordered made free from the terms, covenants and conditions of the lease, assuming that such sale were not void for want of jurisdiction in the court to make and that the lessors had had knowledge of that fact, since the lessors had not consented *in writing* to such sale, they would, because of their acceptance of rent with knowledge of such sale, simply have waived their right to forfeit the lease as against Brown only; but in case he assigned the lease or permitted his interest to be sold under legal process with-

out the written consent of the lessors, they would still have the right to forfeit the lease.

For if a lease upon the condition that it may be forfeited if assigned or sold on legal process without the written consent of the lessor, is nevertheless assigned or sold without such written consent, thereby constituting a breach of the condition and giving to the lessor the right to forfeit the lease, and the lessor with full knowledge of such breach accepts rent from the assignee or permits him to make valuable improvements upon the premises, he thereby waives his right to forfeit the lease because of the breach. But such waiver applies to that breach *only*, and implies no license for a subsequent breach. Hence if such assignee should assign without the written consent of the lessor, the lessor would still have the right to forfeit the lease.

Tiffany on Real Property, p. 179, Section 73.
Tiedeman on Real Property, Section 190, note.
Ambler v. *Woodbridge*, 9 Barn & C., 376; (5 Gray's Cases, 29).
Ireland v. *Nichols*, 46 N. Y., 413.
Alexander v. *Hodges*, 41 Mich., 691.
Crocker v. *Old South Soc.*, 106 Mass., 489.

It is therefore submitted that even if the sale had been ordered made free from the terms, covenants and conditions of the lease, the acceptance of rent and the acquiescence in the improvements would have constituted a waiver of the right to forfeit as against Brown *only* and not as against any purchaser from him or from anyone representing him, and hence the trustee can not sell the lease free from its terms, covenants and conditions.

The case of *Conger* v. *Duryea*, 90 N. Y., 599, cited by counsel for the trustee to support his contention that the

right to forfeit once waived is gone forever, is an authority the other way, and supports the contention of counsel for the appellants, for it holds that the condition in the lease, providing for its forfeiture in case of failure to pay taxes, is waived by the acceptance of rent with *full knowledge* of the breach of the condition, *for that time only*, but that upon a subsequent default in the payment of taxes the lessor would have the right to forfeit the lease. The statement of the court quoted by counsel for the trustee that a condition against assignment once dispensed with is gone forever is a quotation by the court from an earlier New York case. But the purpose for which it is quoted does not appear, for no attempt is made by the court to apply it to the facts of the case nor in support of the conclusion reached in the case, which as above stated was that the condition against forfeiture for non-payment of taxes had, by the acceptance of rent with knowledge of the forfeiture, been waived *for that time only*, but that upon the next default in the payment of taxes, the lease might be forfeited.

III.

Nowhere in his brief does counsel for the trustee answer the contention of counsel for appellants that a consent in writing to the assignment of a lease subject to all of its terms, covenants and conditions is valid, and that the assignee of such a lease takes it subject to those terms, covenants and conditions; but he seems to concede it. He, however, complains that only one case is cited by me to support that contention, viz: the case of *Kew* v. *Trainor*, 150 Ill., 150, and he attempts to distinguish the consent in that case from the consent in this case on the

ground that it was made to apply to one person only, while the consent in the case at bar was not so limited. But the consent in the Illinois case was made after the lessee had assigned the lease and of necessity must have been specific in its character, while the consent in the case at bar was made in advance of the sale and hence could not have been specific. But surely such a distinction is immaterial and can not affect the principle here contended for and which the Illinois case supports, viz., that a lease may be assigned or sold subject to all of its terms, covenants and conditions, and that when so assigned or sold is subject to those terms, covenants and conditions in the hands of the assignee or purchaser and it was not thought necessary to cite other cases on this subject.

There is however a later case in Illinois on this subject, which more definitely supports the principle here contended for, viz., the case of

Springer v. *The Chicago Real Estate Land & Title Co.*, 202 Ill., 17.

IV.

In his fourth proposition counsel for the trustee maintains that the lessors, by accepting rent from the *trustee* after he had elected to assume the lease, estopped themselves from forfeiting the lease in the event of a sale by the trustee.

That contention is completely refuted by the argument in the first brief of counsel for appellants wherein it is demonstrated that the trustee's title to the leasehold is subject to the same terms, covenants and conditions to which it was subject in Brown's hands, and it necessarily

follows that the acceptance of rent by the lessors from the trustee could not operate as an estoppel against them in favor of the trustee any more than the acceptance of rent from Brown could operate as an estoppel in his favor.

But, as shown above, with respect to Brown, it may again be pointed out that before the lessors can be held to have waived their right to forfeit the lease by accepting rent from the trustee after he had elected to assume the lease (even if it be conceded for the sake of the argument that such election might be a breach), it must be shown that the lessors had knowledge of the fact that the trustee had elected to assume the lease for the purpose of sale, and that with full knowledge of that fact they accepted rent from the trustee. But the record shows that the lessors had no knowledge of the trustee's purpose to assume the lease until they were served with notices of the suit to sell it. (See Record, at p. 9.)

Five of the lessors were served with such notices on March 5th, 1906, but the sixth one was not served until March 9th, 1906. On March 5th, 1906, W. H. Gazlay, one of the lessors who was authorized to receive rent, accepted rent from the trustee for the month of February, 1906, but whether it was before or after service of the notice of the suit on the five who were then served does not appear, and, in the absence of direct proof, it can not be assumed that rent was received after service of notices of the suit, especially when it is claimed that such acceptance of the rent constitutes a waiver of the right to forfeit the lease. (See receipt, p. 10 of Record.)

Assuming however that the rent was accepted by W. H. Gazlay after service of notice on the five lessors, there is no evidence to show that he had any authority to waive

the rights of the lessors in the lease, and in fact he had none.

But in any event the sixth lessor was not served with notice of the suit until March 9th, 1906, and no rent has been received since that date.

Hence since the lessors were tenants in common, notice to or knowledge acquired by one of them can not be charged or imputed to any of the others. And therefore the acceptance of rent by W. H. Gazlay even after he had knowledge that the trustee had elected to assume the lease and even if such assumption would have constituted a breach of the condition, would not operate as a waiver of the right to forfeit the lease, not only as against those *not* served but as against even those who were served.

Freeman on Co-tenancy and Partition, Section 171.

Perkins v. *Zumstein*, 4 Ohio Circuit Court, 371.

Judge Thompson's opinion in this case (Record, p. 23).

In final conclusion of the case it is therefore respectfully submitted that for the reasons as set out in both briefs of counsel for appellants, the lessors' right to forfeit the lease in the event of a sale by the trustee is still in full force and effect and that the judgments of the Circuit Court of Appeals and of the District Court holding otherwise are erroneous and should be reversed.

Respectfully submitted,

OSCAR W. KUHN,

Counsel for Appellants.

Cincinnati, Ohio, January 25th, 1908.

FILED.
OCT 21 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART AND CLARA G. KUHN,

APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

APPELLEE.

MOTION TO DISMISS APPEAL AND BRIEF ON SAID MOTION.

PROVINCE M. POGUE,
OF COUNSEL FOR APPELLEE.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

Appellee.

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Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

Appellee.

MOTION TO DISMISS APPEAL.

Now comes Fletcher R. Williams, Trustee and Appellee, and entering his appearance herein for the purposes of this motion only, expressly refraining from entering his appearance herein for any other purpose, and reserving to himself all rights to which he may be otherwise entitled, moves this Court to dismiss the petition and proceedings on appeal herein, for the following reasons:

First: That the Court has no jurisdiction of the cause; and,

Second: That the said proceedings were filed after the time allowed by the Act of Congress, the practice in this Court and Rule 36 of this Court, relating to appeals in bankruptcy from the Circuit Court of Appeals to this Court.

FLETCHER R. WILLIAMS, *Trustee,*

By PROVINCE M. POGUE,

Of Counsel for Appellee.

POGUE & POGUE,

Attorneys for Appellee.

To Oscar W. Kuhn, Attorney of Record, for Appellant in the above-entitled case:

You are hereby notified that the appellee in the above-named cause will, on Monday, the 21st day of October, A.D., 1907, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion and the brief thereon, hereto attached.

PROVINCE M. POGUE,
Of Counsel for Appellee.

Service on the above motion, notice and brief hereto attached are hereby acknowledged this day of , A. D. 1907.

_____
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT, Appellee.

BRIEF ON BEHALF OF APPELLEE ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The facts involved in the case are simple. On July 7th, 1902, William H. Gazlay and others, appellants herein, as lessors, granted to Joseph D. Kueny, his executors, administrators and assigns as lessee, the premises in controversy, located on Vine street, Cincinnati, Ohio, for a period of ten years, ending July 7, 1912. (Record, p. 10.)

Among other conditions in the lease are the following:

> "Provided, however, that..... if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter, and the same to have again, repossess and enjoy, as in their first and former estate; and thereupon this lease and everything therein contained on the said lessor's behalf to be done and performed, shall cease, determine and be utterly void."

There is also a covenant by which the lessee, for himself and assigns, agrees

> "That he will not assign this lease nor underlet said premises nor any part thereof without the written consent of said lessor,"

But there is no covenant as to the matter of a sale.

"Under execution or other legal process." (Record, p. 11.)

Kueny entered into possession under the lease, but subsequently, on April 9th, 1904, the lessors, appellants herein, brought a suit in the Superior Court of Cincinnati, Ohio, alleging non-payment of rent by Kueny, the lessee, and asking for the sale of

> "Said leased premises and the unexpired term thereof, subject, however, to the terms, covenants and conditions contained in the lease from said plaintiff to the said Joseph D. Kueny." (Record, p. 7.)

All the parties then in interest were made parties to said suit and filed pleadings therein, in which, in terms and impliedly, they assented to all the proceedings had in that cause in the Superior Court. As a result, the property was sold as prayed for by the lessors at public auction, and Harry D. Brown, the bankrupt, became the purchaser, entered into possession, and made extensive improvements, all by and with the consent of the lessors, appellants herein, who received rent from him pursuant to the terms of the original lease with Kueny. (Record, p. 8.)

Subsequently, on January 17th, 1906, proceedings in involuntary bankruptcy were instituted against said Brown, and Fletcher R. Williams was put in possession of the premises as receiver by the District Judge. As such receiver he tendered to the lessors, appellants herein, one month's rent for the premises, due in January, 1906. They received it and gave a receipt to such receiver in bankruptcy. In February, 1906, Brown was adjudicated a bankrupt, and the case was regularly referred to Charles T. Greve, as referee, and on February 27th, 1906, the same Fletcher R. Williams, at the meeting of the creditors, was elected trustee, gave bond, and entered into possession of the property in question. (Record, p. 9.) The inventory and appraisement of the bankrupt estate included the interest of the bankrupt, Brown, in this leasehold estate, which was valued in the appraisement at $10,000. Subsequently, March 5, 1906, Williams, trustee and appellee, tendered rent for said premises to the lessors, appellants herein, who accepted it and gave him a receipt as such trustee. (Record, pp. 9, 10.)

It appearing that the lessors, appellants herein, disputed the right of said trustee, Williams, to sell said leasehold interest as a part of the bankrupt estate, the trustee filed in this original cause in bankruptcy an application asking that the lessors be made parties hereto as necessary parties for the complete determination of the matters in controversy. All the lessors were made parties and duly served with process. (Record, p. 2.) Thereafter the lessors filed a motion herein asking the Court to dismiss them from the suit, on the ground that the Court had no jurisdiction to bring them in as parties, unless by their consent, which they expressly reserved.

The petition, motion to dismiss and all matters relating thereto were referred to the referee, Charles T. Greve, who, after argument, overruled the motion of the lessors, appellants herein, and gave leave to said lessors to answer, reserving to them in the entry granting such leave the right to raise the question of the jurisdiction over the presence of the lessors, and the right to answer to the merits, without prejudice to their rights to insist upon the lack of jurisdiction over the presence of the lessors. (Record, pp. 3, 4.)

The referee thereupon heard the arguments upon an agreed statement of facts, both as to the question of jurisdiction and the merits as raised by the petition of the trustee and he answer of the lessors.

It is conceded by the lessors, appellants herein, that the possession of Brown, the bankrupt, the purchaser at the sale by the Superior Court, was lawful, and can not be urged as a ground of forfeiture, and that the interest of Brown passed by operation of law to Williams, the trustee in bankruptcy, and appellee herein, and that the latter is lawfully in possession, and that the transfer of the interest, by virtue of the bankruptcy proceedings to the trustee in bankruptcy, did not constitute a breach of the conditions or covenants of the lease, and is not of itself a ground of forfeiture.

It is claimed, however, that the interest of the bankruptcy trustee is subject to the condition that

> "If said lessee inerest herein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns is first had, it shall be lawful for said lessors," etc.
>
> "Into said premises to re-enter," etc.

And that it is not their intention to waive this condition nor give a written consent to any sale of said interest other than has already been given by the circumstances of the case, and if any sale of the leasehold is made they, the appellants, will forfeit the leasehold and bring a suit to eject the purchaser. Of course, with such a threat, it was difficult to sell or sub-let, and the trustee, the appellee, was forced to quiet the title to this valuable $10,000 asset by having the contending parties, the appellants, before the Court.

Based on such a statement of facts, which is agreed and undisputed, the Referee, in an elaborate opinion, held:

First, that the claim of the lessors, the appellants herein, that the District Court had no jurisdiction over the persons of the appellants for the purpose of this controversy, as set up in their answer and the petition of the trustee, was not well founded (Record, p. 4), and,

Second, that, it being admitted that the trustee, the appellee, is lawfully in possession thereof by operation of law by the waiver of the lessors, the appellants (Record, p. 9),

the referee made the following order (Record, p. 16):

> "The referee further finds that F. R. Williams, trustee in bankruptcy of the bankrupt, Harry D. Brown, has elected to take said leasehold estate, and is in lawful possession of the same, and is entitled to sell said leasehold estate, convert the value thereof into money for the purpose of distributing the money realized from the sale thereof, and free from the claim of said lessors hereto named to forfeit said estate by reason of said sale by the trustee or of the proceedings heretofore had herein, and the referee further finds that said trustee aforesaid is entitled to convey said leasehold estate free from claim of said lessors to forfeit said leasehold by reason of the bankruptcy of said H. D. Brown, or by reason of any sale or assignment of said leasehold property that may be made pursuant to the orders of this Court, for the purpose of converting said property into assets for distribution, to all of which rulings and orders of said referee, said lessors, William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, hereby except. This cause is reserved for further orders of the referee herein as to all matters not determined herewith."

The lessors, the appellants, filed a petition to review the orders of the referee in the District Court at Cincinnati, Ohio. The cause came on for hearing before the District Judge, Hon. A. C. Thompson, and he affirmed the orders of the referee and dismissed the petition for review on June 2, 1906 (Record, p. 25).

The lessors, the appellants, took an appeal to the Circuit Court of Appeals for the Sixth Circuit, to be filed within thirty days from the signing thereof by the Honorable J. K. Richards, United States Circuit Judge. The appeal as granted was filed in the Circuit Court of Appeals, June 6, 1906. The case came on for hearing on appeal and was advanced by the Circuit Court of Appeals under the rules of the Court, it being for the benefit of the bankrupt estate, oral argument was waived, and it was decided on the briefs that were submitted by the appellants and appellee and the Court therein on June 15, 1906, affirmed the District Court. (Record, p. 30.)

Gazlay vs. Williams, 147 Fed. 678.

The Court will notice from the record herein that the decree was entered in the Circuit Court of Appeals on the 15th day of June, 1906. The written opinion was filed in the Circuit Court of Appeals on July 16th, 1906. No petition for a rehearing was filed by the appellants. The appellants never prayed an appeal to this Court until November 16, 1906, and did not file their appeal in this Court until the 16th day of December, 1906. We submit in view of the foregoing statement of

facts that the appeal should be dismissed under the acts of Congress and Rule 36 as adopted by this Court, applicable to bankruptcy proceedings, wherein appeals are taken to this Court from the decrees of the Circuit Court of Appeals.

I.

THE DISTRICT COURT HAD JURISDICTION TO DETERMINE THE MATTER IN CONTROVERSY.

Chapter 2, Bankrupt Act, Sec. 2.

The foregoing provision of the bankruptcy act, we submit, has been construed as applicable to the case at bar and shows that on the statement of facts here undisputed, the District Court had jurisdiction of the matter in question.

First National Bank vs. C. T. & T. Co., 198 U. S. 280.
Whitney vs. Wenman, 198 U. S. 539.
White vs. Serloub, 178 U. S. 542.

The application of the trustee in this case was in the nature of a bill to quiet title to property in possession of the trustee and provide against the adverse claim of the right of forfeiture.

Blair vs. City of Chicago, 201 U. S. 400.

The Court had the power to bring in and substitute additional parties when necessary for the complete determination of the matter in controversy, realize on this value asset of the estate by converting it into money and then distribute it among the creditors.

Hewitt vs. Berlin U. S. Machine Works, 194 U. S. 296.
York Mfg. Co. vs. Cassell, 201 U. S. 344.
Mueller vs. Nugent, 184 U. S. 1.
Bryson vs. Bunkumer, 181 U. S. 188.

As the Court had jurisdiction being in possession, the trustee had a right to sell or transfer the property for a valuable consideration for the benefit of the creditors free from any right of forfeiture on the part of the lessors, the appellants.

First Nat. Bank vs. C. T. & T. Co., 198 U. S. 280.

II.

THE DISTRICT COURT HAVING JURISDICTION AND THE APPEAL NOT HAVING BEEN PROSECUTED FROM THE CIRCUIT COURT OF APPEALS WITHIN THE TIME PRESCRIBED BY THE ACT OF CONGRESS, RULE 36 OF THIS COURT AND PRACTICE IN THIS COURT RELATING TO BANKRUPTCY APPEALS, THIS COURT HAS NO JURISDICTION OF THIS CAUSE ON APPEAL.

When this case was presented to the Circuit Court of Appeals, by reason of the peculiar character of the case, the value of the asset to the estate and the importance of an early hearing so as to determine the rights of the respective parties, that Court advanced this case on its calendar and heard it immediately, as the record shows. The appellant deliberately delayed the filing of an appeal in this case to this Court nearly six months. If it were prosecuted in good faith promptly it might have been entitled to some consideration. This proceeding ties up the property to the detriment of the bankrupt estate.

By reason of this condition of affairs, the trustee and appellee herein, is urging this motion and insists it should be granted in accordance with the construction that should be and has been placed upon the act of Congress and proceedings in this Court. Having that purpose in view, the appellee has caused the record to be printed in full so as to bring a complete statement of the facts before the Court and every proceeding in this cause, and now urges that by reason of the deliberate delay of the appellants he is entitled to take advantage of any technicality that the law may allow him and not permit the appellants to continue this "dog in the manger" policy any longer.

We submit under the very recent opinion of this Court in the case of Conboy vs. First National Bank, decided November 19, 1906, 203 United States Supreme Court Reports 141, that this Court has no jurisdiction in this cause and we ask that the motion be granted, dismissing the appeal in accordance with Rule 36 and the practice in this Court.

One of the Justices of the Circuit Court of Appeals allowed an appeal to this Court. While the certificate of appeal was granted by a Justice of the Circuit Court of Appeals, we submit that this does not give any validity or standing in this Court for want of jurisdiction in accordance with the same opinion.

Conboy vs. First National Bank, 203 U. S. 141.

The appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

PROVINCE M. POGUE,
Of Counsel for Appellee.

POGUE & POGUE,
Attorneys for Appellee.

No. 1[illegible].

SUPREME COURT OF THE UNITED STATES

[illegible] TERM, 19[illegible]

[illegible]

Appellants,

vs.

[illegible]

Appellee.

BRIEF OF APPELLANTS ON MOTION OF APPELLEE TO DISMISS APPEAL.

[illegible]

Counsel for Appellants.

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART AND CLARA G. KUHN,

Appellants,

No. 164. *vs.*

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

BRIEF OF APPELLANTS ON MOTION OF APPELLEE TO DISMISS APPEAL.

The statement of facts, set forth in appellee's brief herein, in support of his motion to dismiss the appeal filed in this court by the appellants herein, while not entirely accurate, is sufficiently so for the purposes of the motion.

From this statement, it appears that the trustee in bankruptcy filed in the bankruptcy court an application, asking for the sale of a certain leasehold estate of which the bankrupt, Brown, was in possession at the date of the bankruptcy proceedings against him, free of any right or claim on the part of the appellants herein to forfeit the same, by reason of the clause in said lease, providing for a forfeiture of it in case of its sale under execution or other legal process. Indeed, on page 7 of the brief of counsel for appellee, he himself defines the proceedings as being "in the nature of a bill to quiet title to property in possession of the trustee, and provide against the adverse claim of the right of forfeiture."

On appeal to the Circuit Court of Appeals that court held that a sale by the trustee in bankruptcy would not be a violation of the clause in the lease providing for a forfeiture of it in case the lessee's interest should be sold on execution or other legal process, without the written consent of the lessors, because such a sale was not covered by that clause.

Gazlay v. *Williams,* 147 Fed. Rep., 678.

The judgment of the Circuit Court of Appeals in this matter was entered on the 15th of June, 1906.

On the 16th of November, 1906, that court allowed an appeal to the Supreme Court of the United States, and on the 6th day of December, 1906, the petition on appeal, together with an assignment of errors, was filed by appellants in this court, and was docketed as cause No. 513 of the October, 1906, Term.

The appeal was, therefore, perfected within six months from the date of the judgment entry in the Circuit Court of Appeals.

The question presented by the motion to dismiss the appeal, is whether or not the appeal was prosecuted in time.

Whether it was or was not depends entirely upon the nature of the action, for the statutes and the rules of this court prescribe different times within which appeals must be prosecuted to this court, for different actions. For example: In suits for the allowance or rejection of claims in excess of $2,000, appeals to this court must be prosecuted within thirty days from the date of the judgment entry in the Circuit Court of Appeals; while, in matters in which appeals are allowed from a court of bankruptcy to Circuit Courts of Appeal, and the judgments of those courts on such appeals are not made final by the act of March 3d, 1891, establishing Circuit Courts of Appeal, appeals are allowed to this court within one year from the date of the judgment entry in that court.

It remains then to determine the nature of this action.

Our contention is that it is "a controversy arising in a bankruptcy proceeding,"

First. Because it involves the title to property in the possession of the trustee upon the determination of which depends the salability of the property. For if the right to forfeit exists and is exercised, no one will buy the property from the trustee, because he would take nothing by the sale. It is therefore clearly distinguishable from a mere proceeding in bankruptcy.

Second. Because it raises a distinct and separable issue from the mere administrative steps in bankruptcy, and is therefore entirely independent of the mere administration of the estate of the bankrupt, such as the determination of the amount and validity of claims against the bankrupt's estate, or the validity and priority of liens against the bankrupt's property in which appellants have no interest whatever as such, for it is only in the event of a sale by the trustee, and possibly after these matters have all been settled, that their rights come into existence.

Indeed, it was solely for the purpose of determining in advance of a sale, whether or not the right to forfeit, as provided for in the lease, still subsists, and what title, if any, a prospective purchaser from the trustee would take, that the trustee had these appellants made parties to his application, and had the question submitted for a decision.

Hence, being "a controversy arising in a bankruptcy proceeding," and not a mere proceeding in bankruptcy, it comes within the provisions of Section 24*a* of the Bankrupt Act, relating to appeals to the Circuit Court of Appeals, and is therefore under Section 6 of the act of March 3d, 1891, above referred to, appealable to this court within one year from the date of the judgment entry.

Hewitt v. *The Berlin Machine Works*, 194 U. S., 296.

That case involved the question as to the right of the trustee in bankruptcy to sell certain property claimed by

the Berlin Machine Works under a conditional contract of sale made with the bankrupt, and this court held that the question there presented was "a controversy arising in a bankruptcy proceeding" as distinguished from "a mere proceeding in bankruptcy," and therefore was appealable to this court by force of Section 6 of the act of March 3d, 1891.

And while that case did not determine the question of the time within which the appeal to this court had to be taken yet since the act defining the kinds of actions that are appealable to this court also prescribes the time within which they may be appealed, it is only necessary to bring a case within the purview of the act relating to its appealability in order to have the provision as to the time for taking the appeal at once apply.

Counsel for appellee has not pointed out specifically what the act of Congress is, to which he refers in his brief, to support his proposition that the appeal in this case was not prosecuted in time. If he means Section 25*b*, as I infer he does from his citation of the Conboy case, it has no application here, for that section refers to cases involving the allowance or rejection of claims in excess of $2,000, while this case in no sense involves the allowance or rejection of a claim.

Rule 36 of the practice of this court, also cited by him, has no application to this case, because it applies only to appeals direct to this court from a District or Circuit Court of the United States.

The case of *Conboy* v. *The First National Bank*, 203 U. S., 141, also cited by him, was the case of an appeal

from a judgment of the Circuit Court of Appeals, allowing a claim in excess of $2,000 against the estate of a bankrupt, and is clearly of no relevancy here.

It is therefore submitted that the appeal in this case was taken within proper time, and the motion to dismiss the appeal, because not filed within thirty days of the judgment, should be overruled.

Respectfully submitted,

OSCAR W. KUHN,

Counsel for Appellants.

Cincinnati, Ohio, October 15th, 1907.

GAZLAY *v.* WILLIAMS, TRUSTEE OF BROWN, BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 164. Argued March 11, 1908.—Decided May 18, 1908.

Where the trustee can only sell a lease subject to the claim of the lessors that the transfer of the bankrupt's interest in the lease gives a right of reëntry under a condition therein, the bankruptcy court has jurisdiction of a proceeding, initiated by the trustee and to which the lessors are parties, to determine the validity of the lessor's claim and remove the cloud caused by the lessor's claim.

The passage of a lease from the bankrupt to the trustee is by operation of law and not by the act of the bankrupt nor by sale, and a sale by the trustee of the bankrupt's interest is not forbidden by, nor is it a breach of, a covenant for reëntry in case of assignment by the lessee or sale of his interest under execution or other legal process, where, as in this case, there is no covenant against transfer by operation of law.

147 Fed. Rep. 678, affirmed.

JUNE 16, 1902, W. A. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Ciara G. Kuhn entered into a written agreement as lessors with one J. D. Kueny, whereby, in consideration of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situate on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional.

The lease contained the following condition:

"Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by

said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to reënter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine, and be utterly void."

On the ninth of April the lessors filed a petition in the Superior Court of Cincinnati, Ohio, against J. D. Kueny for the recovery of rent due under the lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants and conditions contained in the lease from said plaintiffs to said J. D. Kueny." The court thereupon appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property, including said leasehold estate, was sold to H. D. Brown, who took possession of the same, made extensive improvements thereon and paid to the lessors the rent reserved under said lease, from the time he took possession, July, 1905, to January, 1906, when proceedings were begun against him in the District Court of the United States for the Southern District of Ohio, Western Division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown, and on March 1, 1906, he filed in the bankruptcy proceedings an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same.

Process was issued and served upon all but one of the lessors on March 5, 1906, and on that one on March 9, 1906.

On March 6, 1906, said trustee paid to W. A. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. Thereupon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy. Thereupon the lessors filed an answer "and without intending to enter their appearance herein, but acting under protest and the direction of the court," alleged that the lease contained the condition, among others, "that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assign should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to re-enter and the same to have again, repossess and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessor's behalf to be done and performed, should cease, determine and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein. That at the time of filing of the application herein, so far as they know or are informed, the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy."

The case was submitted to the referee upon these pleadings, an agreed statement of facts, and the arguments and briefs of counsel.

The referee found that the trustee being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforcible only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening, and he thereupon held that the lessors had no right, as against the trustee in bankruptcy herein, to forfeit the lease in the event of a sale by him under the court's order and ordered the trustee to sell the same free from any claim or right on the part of the lessors to forfeit the same. To these findings and this judgment of the referee the lessors took exception and filed a petition for a review of the same in the District Court in Bankruptcy. The referee certified his proceedings to the District Court, where, upon a hearing on the pleadings and facts, the findings and judgment of the referee were affirmed and the petition dismissed.

From this judgment the lessors took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. There the cause was again submitted upon the same pleadings and facts as in the District Court, and that court affirmed the judgment of the District Court, and held that the clause in said lease providing for its forfeiture in case of a sale of the same under execution or other legal process, without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy, and that, therefore, the lessors could not forfeit the lease in case the trustees herein should sell the same. 147 Fed. Rep. 678.

From this judgment the present appeal was taken.

Mr. Oscar W. Kuhn for appellants:

As between the original parties to this lease, the condition, that if lessee's interest should be sold under execution or other legal process without the lessors' written consent, it might be forfeited by the lessors, was a lawful and valid condition

and, in the event of such a sale, would have rendered the lease voidable in the hands of the purchaser. *Farnum* v. *Heffner*, 79 California, 575; *Rex* v. *Tapping*, McClel. & Y. 544; *Davis* v. *Eyton*, 4 M. & P. 820; *Doe* v. *Clark*, 8 East, 185; *In re Ells*, 98 Fed. Rep. 967; Tiffany on Real Property, p. 106; 1 Taylor, Landlord and Tenant, 409.

The lessors have the right to forfeit this lease in the event of its sale by the trustee herein under his application for an order of the court to do so. That is to say, the above condition is still in force as between the lessors and the trustee in bankruptcy. The purchaser, Brown, took the leasehold estate subject to all of the terms, covenants and conditions of the lease. *Kew* v. *Trainor*, 150 Illinois, 150.

The lease contains no provision for its forfeiture in the event of the bankruptcy of the lessee, therefore Brown's bankruptcy was not a violation of any of the provisions of the lease. Nor was the passing of Brown's title to his trustee in bankruptcy a violation of any of the provisions of the lease relating to an assignment or sale of it, because this passing of the title to the trustee was accomplished not by a voluntary assignment nor by a sale under execution or other legal process, but solely by force of the bankrupt act, § 70*a* and therefore the lessors had no right to forfeit the lease in the hands of the trustee. *Watson* v. *Merrill*, 14 Am. Bank. Rep. 453, 458; *In re Curtis*, 9 Am. Bank. Rep. 286; *In re Pennewell*, 9 Am. Bank. Rep. 490; *Farnum* v. *Heffner*, 79 California, 575.

But since, as has been shown, Brown held the leasehold estate subject to all of the terms, covenants and conditions of the lease, which made it liable to be forfeited in the event of its sale under legal process without the written consent of the lessors, and since the title of the trustee in bankruptcy is the same as that of the bankrupt, Brown, it follows that the trustee holds the title to the leasehold estate subject to all of the terms, covenants and conditions of the lease, and a sale of it by him under legal process without the lessors' written consent will make it liable to be forfeited in the hands of any

purchaser at such a sale. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; Bankruptcy Act, § 70*a*.

Mr. Province M. Pogue and *Mr. Walter A. De Camp* for appellee:

If the District Court had jurisdiction, then the lessors have lost their right of forfeiture, if a sale is made by the trustee in these proceedings, by reason of the action instituted by the lessors, the appellants, in the Superior Court of Cincinnati, in which the leasehold estate of Kueny was sold at public auction without limit or reserve by that court to Brown, the bankrupt, who took possession and paid rent. *Dumpor's Case*, 4 Coke, 119; *S. C.*, 1 Smith's Leading Cases, 95, 117; Taylor on Landlord and Tenant, §§ 287, 497, 498; *Murray* v. *Harway*, 56 N. Y. 339; *Lloyd* v. *Crispe*, 5 Taunton, 249, 253; *McGlynn* v. *Moore*, 25 California, 384; *Deaton* v. *Taylor*, 90 Virginia, 219, 295; *Conger* v. *Duryea*, 90 N. Y. 599; *Brumell* v. *Macpherson*, 14 Ves. Jr. 175, 176.

After the receiver in bankruptcy took hold, after the trustee had been chosen by the creditors and qualified, after the trustee had elected to take absolutely the leasehold estate for the purposes of sale, and after these very proceedings had been instituted to quiet the title preparatory to a sale, the lessors received rent from the bankrupt estate through Williams, trustee, without objection. Thereby they waived their right of forfeiture, and the trustee can sell free from such right of forfeiture. Taylor on Landlord & Tenant, §§ 497, 498; *Wilder* v. *Eubank*, 21 Wend. 587; *Garnhart* v. *Finney*, 40 Missouri, 449; *The Elevator Case*, 17 Fed. Rep. 200; *Warner* v. *Cochran*, 128 Fed. Rep. 553; *Hasterlik* v. *Olson*, 75 N. E. Rep. 1002 (Illinois); *Fleming* v. *F. H. Co.*, 61 Atl. 157.

There is no provision in the lease for a right of forfeiture by reason of a sale in bankruptcy, and, therefore, even though all other provisions of the lease were preserved, this sale would not entitle them to forfeit if the trustee sold.

By a person being declared a bankrupt, under the terms of the lease, whose provisions have been heretofore quoted, the lease is not forfeited. *In re Ells*, 98 Fed. Rep. 967.

Under the foregoing decision the court says there is no distinction between the old bankruptcy law and the new bankruptcy law on this subject. While there is a diversity of opinion on this subject, the weight of authority seems to be that the lease is not terminated, unless the trustee does not desire to hold it as a part of the estate or unless the landlord has the property turned over to him voluntarily, either through his own act or the act of the trustee. *In re Pennewell*, 119 Fed. Rep. 139 (C. C. A.); Loveland on Bankruptcy, 165 and authorities cited therein; *In re Houghton*, 1 Lowell, 554; *Farnum* v. *Heffner*, 79 California, 580; *Smith* v. *Putman*, 3 Pickering, 221; *Doe* v. *Bevan*, 3 M. & S. 353; *The Elevator Cases*, 17 Fed. Rep. 200; *Gregg* v. *Landis*, 21 N. J. Eq. 494, 501.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

The passage of the lessee's estate from Brown, the bankrupt, to Williams, the trustee, as of the date of the adjudication, was by operation of law and not by the act of the bankrupt, nor was it by sale. The condition imposed forfeiture if the lessee assigned the lease or the lessee's interest should be sold under execution or other legal process without lessors' written consent.

A sale by the trustee for the benefit of Brown's creditors was not forbidden by the condition and would not be in breach thereof. It would not be a voluntary assignment by the lessee, nor a sale of the lessee's interest, but of the trustees' interest held under the bankruptcy proceedings for the benefit of creditors. Jones in his work on Landlord and Tenant lays it down (§ 466) that "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so

drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law." The covenant here is not of that character.

The doctrine of *Dumpor's Case*, 4 Rep. 119; *S. C.*, 1 Smith's Leading Cases, *85, is that a condition not to alien without license is determined by the first license granted, and District Judge Thompson expressed the opinion that it was applicable here, and that the sale to Brown, under the order of the Superior Court of Cincinnati entered on the petition of these lessors for the recovery of rent, set the leasehold free from the forfeiture clauses, especially as that court did not direct that the sale be subject to the terms, covenants and conditions of the lease, as prayed for in the petition. Moreover the lessors, in their answer in these proceedings, stated that "said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein."

In respect of the lessors Brown may be treated, then, as if he were the original lessee, and the sale by his assignee in bankruptcy, under order of the bankruptcy court, was not a breach of the condition in question. The language of Bayley, J., in *Doe* v. *Bevan*, 3 M. & S. 353, cited by the Court of Appeals, is applicable.

The premises in question in this case, being a public house, were demised by Goodbehere to one Shaw for a term of years, and Shaw covenanted that he, his executors, etc., should not nor would during the term assign the indenture, or his or their interest therein, or assign, set or underlet the messuage and premises, or any part thereof, to any person or persons whatsoever, without the consent in writing of the lessor, his executors, etc. Proviso, that in case Shaw, his executors, etc., should part with his or their interest in the premises, or any part thereof, contrary to his covenant that the lessor might

reënter. Afterwards Shaw deposited this lease with Whitbread & Company as a security for the repayment of money borrowed of them; and, becoming bankrupt, and his estate and effects being assigned by the commissioners to his assignees, the lease was, upon the petition of Whitbread & Company, directed by the Lord Chancellor to be sold in discharge of their debt, and was, accordingly, sold to the defendant, and, without the consent of Goodbehere, assigned to the defendant by the assignees, and he entered, etc. The trial judge ruled that this was not a breach of the proviso not to assign without consent, etc., inasmuch as the covenant did not extend to Shaw's assignees, they being assignees in law; wherefore he directed a nonsuit. The rule to set aside the nonsuit was discharged on argument before Lord Ellenborough, C. J.; LeBlanc, J.; Bayley, J., and Danforth, J. (delivering concurring opinions), and Bayley, J., said:

"It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act, but by the operation of law transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it. Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Decree Affirmed.